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RESTORATIVE JUSTICE SYSTEM GUARANTEED UNDER RIGHT TO LIFE

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Ms. Prashita Mishra **

Abstract: Restorative justice system is an approach to Justice by involving the victim, offenders and the community. Restorative justice brings the aggrieved party and those who are responsible for the aggravation into communication, enabling everyone affected by a particular incident to play a part in restoring the harm and finding a positive way forward. It is a new technique of responding to crime and harm based on ancient practices. The present paper delves into the doctrines and fundamentals of 'restorative justice' to introduce the same in criminal justice administration in India. This paper also discusses whether Death Penalty is constitutionally valid or not? Whether Section 354(3) of Criminal Procedure Code is violative of Article 21, which is the basic structure of the Constitution and Article 6(1) of the International Covenant on Civil and Political Rights as adopted by the General Assembly of the United Nations and reiterated in the Stockholm Declaration. It is further followed by the abolishment of capital punishment or death penalty in India by discussing some of the landmark cases such as *Bachan Singh v. State of Punjab*, 1980. More than 160 Members States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.
Paper also deals with the Bentham's penal theory and concludes by discussing about the necessity of implementation of restorative criminal justice system for the dynamic society. This is important for preserving socio-cultural and socio-political factors and right-to-life of the offenders which is inspired by liberalization and can effectively help in the administration of criminal justice. This can also decrease red-tapism and can solve various problems like overcrowding in prison, inordinate delay in criminal trials, victim's dissatisfaction which is prevalent in existing traditional criminal justice adjudication.
Keywords: Death Penalty, Right to Life, Restorative Justice.

Introduction:

Dissatisfaction and frustration with the formal justice system and resurging interest in preserving and strengthening customary law have called for alternatives responses to crime and social disorder.[1] Restorative Justice Theory

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[1] Handbook on restorative Justice Programs, United Nations Publication, 2006, Available at:
https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

and programs have emerged over the past 35 years as an increasingly influential world-wide alternative to criminal justice practice.[2]

Death penalty is a very controversial and multifaceted subject.[3] There is simply no use for it in the 21st Century, from both a monetary and humane point of view.[4] Most people express various doubts about the death penalty when presented with some of the problems prevalent in the society. The perception of racial injustice within the criminal justice system, symbolized by the image of Rodney King in Los Angeles, is reinforced by the fact that Blacks are represented on death row three and half times their proportion as a whole and defendants who kill a white person in America are many times more likely to get the death penalty than those who kill black person.[5] Almost three- fourths of Black believes that a black person is more likely than a white person to receive the death penalty for the same crime.[6] The strongest doubts, however, raised is that innocent people can be executed.[7] Many innocent lives might have been sacrificed and the same is undoubtedly true of some who are on death row today.[8]

Death penalty and is execution should not become a matter of uncertainty.[9] In recent years, the Supreme Court has also admitted that the question of death penalty is not free from the subjective element and is sometimes unduly influenced by public opinion. Studies of the cost of death penalty show that death penalty is much more expensive than the alternative of life in prison.[10] With all forms of government experiencing a need for streamlining expensive programs, the death penalty is ripe for a cost and benefit review.[11] As the number of death row inmates across the country continues to reach record highs, and as the pace of executions accelerates, the probability of innocent people receiving the death penalty increases.[12] Thus, restorative justice is necessary because it aims at encouraging offenders to take responsibility for the consequences-of their actions; express repentance and repair the harm they have done.[13] It also emphasizes the reintegration of offenders into communities

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[2] Available at http://restorativejustice.org/restorative-justice/about-restorative-justice/
[3] Available at http://www.cuadp.org/
[4] *Id.*
[5] See, e.g., Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, at 5 (1990)
[6] A. Gallup & F. Newport, Death Penalty Support Remains Strong, But Most Feel Unfairly Applied, The Gallup Poll News Service, June 26, 1991, at 4.
[7] Sentencing for Life: Americans Embrace Alternatives to the Death Penalty, Richard C. Dieter, Esq., 1993 Available at http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty
[8] *Id.*
[9] Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546
[10] See, e.g., Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty, The Death Penalty Information Center (1992).
[11] See, e.g., Tabak & Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 Loyola of Los Angeles Law Review 59 (1989).
[12] Supra, note 7.
[13] Haveripeth, Prakash D., Restorative Justice and Victims: Right to Compensation, Int.

rather than their control through strategies of punishment and exclusion.[14] It is imperative to study that a deeper study be conducted to highlight whether the process of awarding capital punishment is fraught with subjectivity and caprice.[15]

Restorative Justice System:

"Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm."[16] Restorative justice seeks to heal and put right the wrongs.[17] Restorative justice emphasizes the importance of role of crime victims and community members through more active involvement in the justice process, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation, and problem solving, whenever possible, which can lead to a greater sense of community safety, social harmony, and peace for all involved.[18]

Background: A Brief History of Restorative Justice

In many countries, the idea of community involvement enjoys a large consensus.[19] These include "communitarian justice", "making amends", "positive justice", "relational justice", "reparative justice", "community justice",

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Res. J. Social Sci., Vol. 2(2), February (2013) P. 44, Available at http://www.isca.in/IJSS/Archive/v2/i2/7.ISCA-IRJSS-2012-18.pdf

[14] *Id.*

[15] Consultation Paper on Capital Punishment, Law Commission of India, Available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwiOpMjdvIzSAhVKqY8KHRm1BeQQFggiMAE&url=http%3A%2F%2Fwww.lawcommissionofindia.nic.in%2Fviews%2Fconsultation%2520papercapital%2520punishment.doc&usg=AFQjCNHAixNPsU9kvf94nlw-_WzrFkVUGg&bvm=bv.146786187,d.c2I

[16] Bonta, J., Jesseman, R., Rugge, T., and R. Cormier, "Restorative Justice and Recidivism: Promises Made, Promises Kept?", in Sullivan, D. and L. Tifft (Eds.), Handbook of Restorative Justice: A Global Perspective. London: Taylor and Routledge, (2006).

[17] Zehr, H. "The Little Book of Restorative Justice" Good Books Publication, , Intercourse, PA, 2002, p.67 Available at: https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf

[18] Bazemore, G. and M. Umbreit, Conferences, Circles, Boards, and Mediations: Restorative Justice and Citizen Involvement in the Response to Youth Crime. St. Paul, MN: Balance and Restorative Justice Project (1998) Available at: https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

[19] Faget, J., "Mediation, Criminal Justice and Community Involvement, A European Perspective" in The European Forum for Victim-Offender Mediation and Restorative Justice (ed.), Victim-Offender Mediation in Europe—Making Restorative Justice Work. Leuven: Leuven University Press, (2000) p. 39.

and "restorative justice", among others.[20] Any discussion on restorative justice refers to Alternative Dispute Resolution (ADR) which helps to achieve its objectives. ADR includes arbitration, mediation, early neutral evaluation and conciliation which have been institutionalized by many countries of the world to overcome arrears in the courts, rising costs of litigation and time delays continue to plague litigants.[21] Restorative justice can inform every aspect of the criminal justice process and, when appropriate, build upon traditional practices.[22]

Restorative justice programs can be used to reduce the burden on the criminal justice system, to divert cases out of the system and to provide the system with a range of constructive sanctions.[23] The priority of the criminal justice system should be resolving conflict between the offender and the victim therefore; the aim should be to meet to convince the offender his responsibility of the crime.[24] What required is a paradigm-shift from punitive justice to restorative justice, which will meet to the need for restitution or reparation of harm to the victims and prevail over demand for punishment.[25]

International Perspective on Restorative Justice System and Right-To-Life

In only twenty-five years, restorative justice has become a worldwide criminal justice reform dynamic. Well over 80 countries use some form of restorative practice and many of them are at experimental and localized stage which plays a significant role in the national response to crime.[26] The *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty- first Century* (2000) encouraged the "development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties".[27] In August

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[20] Miers, D., "An International Review of Restorative Justice". Crime Reduction Research Series Paper 10. London (U.K.): Home Office, (2001), p. 88. Available at: https://restorativejustice.org.uk/sites/default/files/resources/files/An%20International%20Review%20of%20Restorative%20Justice.pdf

[21] Bajpai, G S, Victim in the Criminal Justice Process: Perspectives on Police and Judiciary, New Delhi: Uppal Publications, 1997.
Available at:
http://www.forensic.to/webhome/drgsbajpai/towards%20restorative%20justice.pdf

[22] Supra Note 1

[23] *Id.*

[24] Supra, note 7.

[25] *Id.*

[26] In 2001, the Centre for Justice and Reconciliation at Prison Fellowship International identified 80 countries in which some form of restorative justice intervention was being used. (Van Ness, 2001, at 13). The estimated increase by 20 nations is based on two factors: the growing number of countries in which restorative approaches are being tried and the growing literature on the subject which is bringing existing restorative practices to the attention of observers.

[27] *The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 184/4/Rev. 3, para. 29.

2002, the United Nations Economic and Social Council adopted a resolution calling upon Member States that are implementing restorative justice programmes to draw on a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* developed by an Expert Group.[28] In 2005, the declaration of Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (2005) urged Member States to recognize the importance of further developing restorative justice, policies, procedures and programmes that include alternatives to prosecution.[29]

How does it work? Better Theory For Better Practice

"Everyone has the right to life, liberty and security of person."[30] The right to life is to be protected by law.[31] The death penalty is a denial of the most basic human rights; it violates one of the most fundamental principles under widely accepted human rights law- that states must recognize the right to life.[32] Imposition of Death Penalty breaches fundamental enshrined human rights norms.[33] The state should not arbitrarily deprive any person of their lives.[34] In fact, more than 160 Member States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.[35] UN Secretary-General Ban Ki-Moon remarks that "the death penalty has no place in the 21st century" and further declared, calling on all states to take concrete steps towards abolishing this form of punishment.[36] The office of the High Commissioner for Human Rights advocates for the universal abolition of the death penalty and argues this position for other reasons, including the fundamental nature of the Right-to-life; the unacceptable risk of executing innocent people; and the absence of proof that the death penalty serves as deterrent to crime.[37]

The draftees of the International Covenant on Civil and Political rights (ICCPR) had already begun moves for its abolition in International law.[38] In

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[28] *The Bangkok Declaration—Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, para. 32.

[29] Note also that, in 2001, the European Union issued a framework decision stating that member states should promote mediation in criminal cases and bring into force their legal instruments by 2006. See. European Union Council Framework Decision of 15 of March 2001 on the Standing of Victims in Criminal Proceedings, Article 10.

[30] Article 3, UN Universal Declaration of Human Rights

[31] Article 6, International Covenant on Civil and Political Rights

[32] The Death Penalty is a Human Rights Violation: An Examination of the Death Penalty in the U.S. from a Human Rights Perspective, Available at http://ccrjustice.org/sites/default/files/assets/files/CCR%20Death%20Penalty%20Factsheet.pdf

[33] *Id.*

[34] Supra, note 31.

[35] Available at http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx

[36] Available at http://www.un.org/apps/news/story.asp?NewsID=48192#.WKAUklN94dU

[37] Supra, note 7.

[38] *Id.*

1989, 33 years after the adoption of Covenant itself, member states which became parties to the Protocol agreed not to execute anyone within their jurisdictions.[39] General Assembly urged the states to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death.[40]

In 1984, the UN Economic and Social Council adopted safeguards guaranteeing protection of the rights of those facing the death penalty.[41] It is to be noted that worldwide, over 140 countries have abolished death penalty and over 20 other countries though retentionists, have not executed capital sentences in ten years.[42]

The expanding universe of compassionate criminology must so respond realistically to the new challenge of human rights and social justice to salvage, solace and restitute victims of crime and abuse of power by resorting to new methodologies of reparative, compensatory, preventive and other judicial remedies.[43]By taking into consideration the provisions of the International Covenant on Civil and Political rights, the Universal Declaration of Human Rights, the Convention on the rights of Child, Convention against torture and other cruel, inhuman and degrading treatment or punishment and other international conventions, it must be noted that the abolition of death penalty and the reduction of number of offences in statute books which notify capital punishment are stated to be a part of international customary law.[44]

Public Opinion upon Restorative Justice System rather than Death Penalty

This line by Mahatma Gandhi is the thrust of the Reformative theory of Punishment. Not looking to criminal as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crime.[45]

Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. This theory aims at rehabilitating the offender to the norms of the society i.e., into law-abiding

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[39] A/RES/44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989 Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx

[40] A/RES/69/186, Moratorium on the use of the death penalty, 2014 Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/186

[41] Supra, note 7.

[42] As per death penalty related statistics Available at http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries

[43] Supra, note 12.

[44] Supra, note 15.

[45] Sue Rex & Michel Trony, "Reform and Punishment" Willian Publishing.

member. This theory condemns all kinds of corporal punishments.[46] "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years".[47] "There is an effective alternative to burning the life out of human beings in the name of public safety. That alternative is just as permanent, at least as great deterrent and – for those who are so inclined— far less expensive than the exhaustive legal appeals required in capital cases. That alternative is life imprisonment without the possibility of parole".[48]

Practical Challenges to Restorative Policy and Practice

In 1966, more Americans opposed the death penalty than favored it.[49] Support for the death penalty drops precisely to the same low percentage as in 1966 when people are given the choice of stringent alternative sentences.[50] The several polls done by firms of Greenberg/Lake and the Tarrance Group revealed an increasing trend that Americans would favor certain alternative sentences over the death penalty.[51] Polls conducted in recent years in California, New York, Oklahoma, Virginia and West Virginia concluded that people prefer various alternative sentences to the death penalty.[52] The state polls reveal a number of other significant public perceptions on the death penalty. For example: Nebraskans twice as many selected alternative sentences over the death penalty;[53] a majority of New Yorkers agreed that the best way to reduce crime is to give disadvantaged people better education, job, training, and equal employment opportunities;[54] respondents of Florida believed that the death penalty is racially and economically discriminatory;[55] Oklahamans also preferred a sentence of life in prison over the death penalty by a margin of 56-35% if they were convicted that the death penalty discriminates against minorities.[56]

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[46] Ratan Lal v. State of Rajasthan and Ors; 2007 Cri.L.J. 2467

[47] Late Judge Charles Weltner, Georgia Supreme Court, Savannah News-Press, Mar. 23, 1986, at 7C, (quoted in Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty), Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr18&div=12&id=&page=

[48] M. Cuomo, New York State Shouldn't Kill People, The New York Times, and June 17, 1989.

[49] H. Zeisel & A. Gallup, Death Penalty Sentiment in the United States, 5 Journal of Quantitative Criminology 285, 287 (1989).

[50] Available at http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty

[51] *Id.*

[52] Information regarding the various polls is on file with the Death Penalty Information Center.

[53] Bowers & Vandiver, Nebraskans Want an Alternative to the Death Penalty, Executive Summary, at 7-8(1991).

[54] W. Bowers & M. Vandiver, New Yorkers Want an Alternative to the Death Penalty, Executive Summary, appendix summarizing other state polls (1991).

[55] Cambridge Survey Research, Attitudes in the State of Florida on the Death Penalty, Executive Summary, at 5 (1986)

[56] Grasmick & Bursik, Attitudes of Oklahomans Toward the Death Penalty, Univ. of

The number of people on death rows across the United States also continued to decline in 2016, as the number of prisoners obtaining relief from their convictions or death sentences or dying in custody outpaced the number of new death sentences imposed in most states as states like Georgia, Missouri, and Texas executed more prisoners than they sentenced to death.[57] The 30 death sentences expected to be imposed in 2016 represent a 39% decline from last year's 42-year low, and are down more than 90% from the 315 death sentences imposed during the peak death-sentencing year of 1996.[58]

Capital Punishment in India: Punishment, Justice and Restoration Today

UN General Assembly adopted Resolution calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolish death penalty.[59] India is, however, one of the 59 nations that retain the death penalty.[60] It is to be borne in mind that India before it executed Ajmal Kasab and Afzal Guru last year, had an execution free run for a period of 8 years between 2004 and 2013.[61] In 1962, the Law Commission undertook an extensive exercise to consider the issue of abolition of capital punishment from the statute books but released its report in 1967 recommending retention of death penalty.[62] The report also does not discuss in detail the apprehension regarding the arbitrary use of the Court's discretion in capital sentencing.[63] Section 303[64] of Indian Penal Code which provides for mandatory death penalty violates the guarantee of equality and contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.[65]

The Supreme Court also struck down Section 27(3) of Arms Act, 1959 providing for mandatory death penalty.[66] In contemporary judicial developments, with fairness norms more stringent than ever before, the Supreme Court has in the last 5 years repeatedly expressed anxiety about uneven application of death penalty as also miscarriages occasioned in death penalty cases.[67] In 2003, 187th report was taken up by the commission to consider the fundamental questions relating to death penalty afresh and

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Oklahoma, at 21, 25 (1988).

[57] The Death Penalty Report in 2016: Year End Report Available at: http://deathpenaltyinfo.org/documents/2016YrEnd.pdf

[58] *Id.*

[59] Supra, note 15.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Punishment for murder by life-convict

[64] Supra, note 15.

[65] Mithu V. State of Punjab, (1983) 2 SCC 277

[66] State of Punjab v. Dalbir Singh

[67] Supra, note 15

alternatives to the same.[68] Judges should never be bloodthirsty.[69]

A real and abiding concern for the dignity of human life postulates resistance to taking life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[70] The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by the court depends a good deal on the personal predilection of the judges constituting the bench.[71]

On one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by the court and on other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack on inconsistency by the Court in giving punishments or worse the offender allowed to slip away unpunished on account of the deficiencies in the criminal justice system.[72] Capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21.[73] In a capital punishment if this happens with some frequency there is a lurking conclusion as regard the capital sentencing system becoming constitutionally arbitrary.[74]

Therefore, an equal protection analysis of this problem is appropriate and is more than an acknowledgement of an imperfect sentencing system.[75] Thus the overall picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice which is a matter of concern for the court and need to be remedied.[76] The *rarest of the rare* cases is to be determined by the facts and circumstances and there are no strict guidelines for the same.[77] The procedure suggested mandates that it should be in the nature of safeguards and should be read with Article 21 and 14.[78] Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage.[79]

Concluding Observations:

Cases that pursue the death penalty tend to be a lot more expensive

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[68] *Id.*
[69] Bachan Singh v. State of Punjab (1980) 2 SCC 684.
[70] *Id.*
[71] Swamy Shraddananda v. State of Karnataka (2008) 13 SCC 767
[72] *Id.*
[73] Santosh Kumar Satisbhushan Bariyar v. State of Maharashtra 2009
[74] *Id.*
[75] *Id.*
[76] Supra, note 69.
[77] Supra, note 67.
[78] *Id.*
[79] Supra, note 71

and which is a monetary as well as purely practical concerns.[80] The repots is its analysis of Supreme Court decisions on death penalty recorded that "the death penalty is India has been arbitrary, imprecise and abusive means of dealing with crime and criminals."[81] The members of international civil society, politicians and legal experts should unite to elaborate abolitionist strategies for the years to come at the national, regional and international levels, and to send out a clear message to the world: that universal abolition is essential for a world where progress and justice must prevail.[82]

Article 21 rights in here in a person so long as he lives and that they are relevant and applicable at all stages of the judicial process: trial, sentence and execution of the sentence.[83]In the penal alternatives, death penalty can be replaced by life imprisonment without possibility of parole after serving a minimum of 25-30 years. Life without parole also costs a lot less and allows for mistakes to be corrected. But as we are dealing with restorative and preventive alternatives there should be utilization of financial resources which are wasted in pursuing death penalty.

Early childhood education programs should be effectively implemented to control the crimes at very early stage. "No future without forgiveness".[84] Restorative justice programs such as victim- offender mediation and facilitated dialogue should be executed in India and in the whole world and it must possess goal-oriented behavior. There should be circles which not only involve victim and offender but also their family members, community members, and government representatives.

There should be offender re-entry support programs in every society. Family and friends are often expected to facilitate reentry by providing housing, financial and transportation and personal support. There should also be ex-offender assistance programs to provide services to offenders while they are in prison and after their release too. Punishment is not only degrading to those on whom it is imposed, but it is also degrading to the society that engages in the same behavior as criminals".

Restitution programs is also one of the way which requires offenders to repay those who have been harmed, generally through monetary payments and in-kind services *i.e.,* unpaid work for the benefits the community and victims as well. All these programs have the potential to reduce the caseload of traditional

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[80] Available at http://www.cuadp.org/

[81] Lethal Lottery: The Death Penalty in India, 2008 Available at: https://www.amnesty.org/en/documents/asa20/007/2008/en/

[82] 5th World Congress Against the Death Penalty, 2013 Available at http://www.worldcoalition.org/World-Congress-Against-the-Death-Penalty-madrid-2013-ecpm- coalition-abolition-activists.html

[83] Sher Singh and Ors. v. State of Punjab (1983) 2 SCC 344

[84] Archbishop Desmond Tutu, "No Future Without Forgiveness", Doubleday Publication, New York , 1999

criminal justice and can also address the issues which are ignored by the former. The restorative justice should be built on a strong base to respond the systematic and political realities which can strongly promote the vision of the same. The implementation is necessary to be in the right criteria which will help the programs to be more restorative in their treatment of victims, offenders and community members.

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NEED FOR A LAW TO PREVENT ONLINE CHILD SEX TRAFFICKING

Dr. Ranjana Ferrao[1]

Abstract: *The internet provides a secure and safe environment for traffickers to reach out to children from the comfort of their homes. Traffickers find it easier to commit the crime without being caught. Traffickers are stalking children, grooming them and encouraging them to upload obscene content. With increasing internet usage cchildren are making lewd comments and sharing obscene pictures of themselves and other children. Children are watching pornography and sharing pornography. This Article discusses the change of modus operandi in trafficking by using internet as an active tool. Though the number of crimes is rising yet the law is till lacking behind. India has no legislation to prohibit and punish online trafficking and related activities. This article argues for a law to prohibit online trafficking.*
Key Words: Online Trafficking, Pornography, Grooming**.**

Introduction:

Human trafficking is a worldwide issue and one of the most heinous crimes, touching the lives of millions of people. Every day, human traffickers deceive women, men, and children from all over the world, forcing them into exploitative conditions. Trafficking denies the victim human rights and a right to live a dignified life. There are many international conventions and laws which punish the offence of trafficking yet prosecuting this crime has been extremely challenging for the law enforcement agencies.

The internet's arrival was critical in transforming the trafficking business for the better. It now became safer for the traffickers to commit the crime without being caught. It is believed *'The internet never sleeps; and the internet never forgets.'* Traffickers are able to protect themselves by utilising the anonymity of the internet. Earlier traffickers worked very hard and spent their time on the streets now with the internet they work in the safe heaven of their homes. Earlier the traffickers found few buyers and often had to deal with annoying and argumentative clients. The internet with a click of a button they find clients easily with no hassled. More and more clients to feel relaxed in buying sexual services online rather than in the physical world.

Rise in Online Sex Trafficking

In India in *Kamlesh Vasvani .v. Union of India*[2] the Supreme Court of India had directed to block many websites which had child pornographic content. School premises and school buses had to install jammers so that children were unable to use internet and have access to pornographic sites. The Government of

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[2] Writ Petition(s)(Civil) No(s). 177/2013

India acted on the directions passed by the Supreme Court and all pornographic websites were blocked. But immediately next day new websites sprang to life.

Children were always forbidden from using the mobile phones. 'Covid-19' pandemic changed this norm. Schools were shut down and education was imparted through the digital mode. Children were always kept away from the laptop and mobile phones. The same prohibited gadgets, now became a necessity. India has reported a 45% increase in use of internet during the 'Covid-19' pandemic.[3]Children started spending nearly five hours a day in online activity either attending classes, surfing the internet or in playing online games.

A recent report by India Child Protection Fund stated that a study conducted by Europol, the United Nations and ECPAT found that the lockdown caused a surge in increase in the demand for child sexual abuse material on the internet.[4] Many pornographic websites gave free access to pornographic content. The users who visited such websites normally preferred 'exploitative and violent' child pornographic material. In India there has been a 95% increase in searches conducted for child sexual abuse material. Social networking sites have been a hub for sharing obscene images of young girls.[5] Use of technology has become the easiest and fastest way for traffickers to find, traffic and exploit children.

Today clients can order a child online as if they order food through swiggy or zomato. Advertisements are posted for massage services, yoga services, club and dance activities, beaty salons etc. The clients can order a child according to their preference for example according to the country of origin, according to the age, education, skin colour, educational background. The biggest challenge is prosecuting the crime of trafficking. The anti-trafficking law looks at the victim and presumes that they must be exploited. The victim must be sold and the victim would need to be rescued. The law has forgotten that the victim could have got there through their own free will. The victim may often remain voiceless and the victim may not be aware that an offence has been committed.

Modus Operandi of Online Traffickers

The Traffickers befriend children on social media sites. After winning the child's confidence, they entice the child with praises, gifts and money. They develop an emotional connect with the child and the child begins to trust this unknown person. The abuser now takes complete control over the child. The

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[3]Statistica, Internet penetration rate in India from 2007 to 2021 available at https://www.statista.com/statistics/792074/india-internet-penetration-rate/ last accessed on 12th June 2021

[4] ICPF report warns of sharp rise in
Available at
http://timesofindia.indiatimes.com/articleshow/75127399.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst last accessed on 14th June 2021

[5] Tehelka the Truth behind #Boi's locker Room available at http://tehelka.com/the-truth-behind-boislockerroom/ last accessed on 15th June 2021

relationship may proceed from an online mode the relationship can proceed to an offline mode.[6] They first begin by grooming the child and later exploit them.

Traffickers often use location tracking appliances and global positioning systems present in the cell phones to track the victim they are interacting with. Every phone has a camera the abusers compel children to keep their cameras on while chatting with them. This helps them not only to see the child but also trace the child's surrounding. They click pictures of the child. IF the child refuses to chat with them they often blackmail the child and threaten to release nude images of the child to their family and friends if they do not fulfill their demands.

Laws for Trafficking in India

India has the Immoral Traffic Prevention Act, 1956 and the Indian Penal Code, 1860 penalize the offence of trafficking and activities related to them. The law punishes brothel keepers and those aiding and facilitating prostitution. Any person trying to make a living on misusing the earning of the victim is punished under the law. The law does not penalize the buyers. It only punishes the traffickers.

Sex Work in the Age of the Internet

"Surfing the internet" quickly become a household term. Within a short time numerous websites emerged selling pornography specially those involving children. www.sex.com, www.pornhub.com and even more recently in India there have been discussions on online social platforms like boislocke room. The internet-facilitated a wave of prostitution that gave sex workers the ability to reach a large number of clients for a low cost with informative advertising and high-quality service. Artificial intelligence helped use screening methods to reduce the risk of being caught and saving themselves from undesirable clients.

Stages in the Online Sex Industry

Even before a child is sold on an online portal the child must be prepared for putting out sexually explicit content for sale. There are different stages in which the child is prepared. The first stage is grooming. The second stage is sexting developing a personal rapport with the child through messages and viewing the child. The third stage is using the child for sexually explicit content by making the child performing that content.

a. **Child Grooming-**Children tend to derive pleasure from being in a virtual romantic relationship. They begin chatting with the alleged lover. This unknown lover gains confidence of the child by sending pictures of himself/herself. The lover forces the child to send a picture of themselves. If the child refuses the child could be blackmailed and threatened. The lover then turns into an abuser may threaten to commit suicide if the child does

[6] Ecpat, Online child sexual exploitation available at https://www.ecpat.org/what-we-do/online-child-sexual-exploitation/ last accessed on 14th June 2021

not obey. This abuser grooms the child so that sexually explicit images can be created suitable for uploading to the internet.

The International Labour Organisation, Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse has defined grooming.

> 'The process of establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person.' There are debates in India to consider 'grooming of children' being made an offence.[7]

India has no law to punish acts of 'online grooming' of children. Alarmed by the rise in pornographic content on social media the Government constituted a committee[8] under the Chairmanship of Jairam Ramesh to study pornographic content on social media and its effect on children. The Jairam Ramesh Committee is proposing changes to the *Protection of Children from Sexual Offences Act, 2012*. Online grooming should be defined as;

> 'Knowingly persuades, coerces, entices, grooms, communicates, arranges a meeting with a child for oneself or another person and/or meets with a child with the intent of sexually abusing the child, and even if the actor thinks he/she is communicating with a child but is actually talking to an adult.'

b. **Sexting-**The abuser begins a steady relationship with the child. Messages are send over wattsapp text Sexting is "exchange of sexual messages or images" and "the creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and/or the internet"[9]Sexting is unwanted sexual comments.'[10] The Jairam Ramesh Committee has recommended introducing a new provision of punishing communication with a child for '*persuading, enticing, grooming, communicating, arranging meetings with the child with an intention of sexually abusing the child*.'[11]

c. **Online Child Sexual Abuse and Pornography-**The last stage the abuser has not trained the child so that the child could be abused online. Online sexual abuse' is a commonly used term for any form of sexual abuse of children. It could include offences like rape, sexual molestation, sexual touching, sexual harassment. Children may be made to perform 'live' sexual acts which could be online or offline. This means the data is transmitted instantaneously to

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[7] A report presented to the Chairman of the Rajya Sabha in January 2020 by a ADHOC committee

[8] 12 December 2019

[9] UNODC, "Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children", p.22

[10] Edex Live Increase in online child sexual abuse due to pandemic, parents asked to track children's internet available at www.edexlive.com last accessed on 18th June 2021

[11] These offences to be inserted in the POCSO Act, 2012 under Section 11 after clause (vi), namely: (vii)

> the viewer, who can watch and engage while the abuse is occurring. 'Live streaming' is not yet defined as an offence. The abuser can send harmful content or pornography to a child or may watch pornography in the presence of a child. The abuser could make the child to exhibit its body parts. The abuser may entice the child to create pornographic content.

The term commonly used is 'online child sexual abuse' the preferred term would be "online-facilitated child sexual abuse." Facilitating 'online child sexual abuse' is an offence under Section 67(d) of the *Information Technology (Amendment Act), 2018.*[12] Uttering words, making gestures, exhibiting own body parts, making a child exhibit body part, showing pornography, threatening to use a sexual act involving a child, enticing a child for pornographic purpose is called as 'sexual harassment[13]' and such acts are punished under the *Protection of Children from Sexual Offences Act, 2012.*[14]

The Convention on the Rights of the Child uses the term 'the exploitative use of children in pornographic performances and material,' however the Convention does not define this term. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Child pornography is defined as '*Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.*[15]'

The Protection of Children from Sexual Offences Act, 2019 defines 'child pornography;'

> 'Any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer-generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child.[16]'

In India a person is permitted to watch pornography.[17] Pornography has a harmful effect on the young mind of the child. Research by Chris Ferguson, a professor of psychology at Stetson University, and Richard Hartley**,** chair of UTSA's Department of Criminology and Criminal Justice indicates that watching '*pornography leads to sexual crimes, violent sexual behaviour, aggression, frustration and depravity of mind.'*[18]The Supreme Court Women's Lawyers Association filed a petition requesting the Supreme Court of India block all pornographic sites.[19] They requested the Court to frame a national policy to curb child porn. The Supreme Court directed the Government to block websites offering

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[12] Act No. 10 of 2009; Herein after referred to as POSCO Act, 2012
[13]The Protection of Children from Sexual Offences Act, 2012 Section 11
[14] Act No. 32 of 2012
[15] Article 2(c)
[16] Section 2(da)
[17] Kamlesh Vasvani .v. Union of India Writ Petition No 177/ 2013
[18] https://www.utsa.edu/today/2020/08/story/pornography-sex-crimes-study.html
[19] Supra Note 50

child pornography. 857 pornographic websites were shut down. Immediately new pornographic websites were up on proxy serves.

In *P.G.Sam Infant Jones .v. State rep.by the Inspector of Police*, the Madhurai Bench of the Madras High Court observed that though Child pornography constitutes an offence there is no provision in the Indian law for prohibiting viewing pornography. The court held;

> 'That the 'Big Brother' is watching us may not deter those who are determined to indulge in such acts of perversity. The system also may not be able to prosecute every offender. Therefore, it is only through moral education, there can be a way out. It is only the Bharatiya culture that can act as a bulwark." We should ensure that no child is sexually exploited.'

Children are making lewd comments and sharing obscene pictures of themselves and other children. These pictures are categorized as self-generated sexual content/material. Children are watching pornography and sharing pornography. Alarmed by the increasing number of children watching pornography in school buses. The Supreme Court directed all schools in India to install jammers in buses to prevent access of pornographic sites on cell phones. Children are also liable for creating pornographic content.

The Protection of Children from Sexual Offences Act, 2012 and Section 293 of the *Indian Penal Code, 1860* criminalizes the sale, distribution, exhibition, circulation, etc. of any obscene material to any person below the age of twenty years.[20] Sale of pornographic material for commercial purpose is specifically prohibited.[21] The POSCO Act punishes a person who uses a child for a pornographic act or directs a child and participates in the pornographic act. A person could be punished for storing pornographic content involving a child.[22]

The Information Technology (Amendment) Act, 2008 punishes a person for creating electronic content depicting children in obscene, indecent or sexually explicit manner.[23]These activities include 'creating text or digital images, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing child pornographic content.' The law keeps a check on paedophiles by punishing acts of enticing, cultivating or inducing a child in an online love relationship.[24] An adult recording self-abuse or abuse of others is a punished.[25]

The Information Technology (Amendment) Act, 2008 does not define 'sexually explicit act or conduct.' The Jairam Ramesh Committee has suggested that sexually explicit conduct does not require that an image depict a child engaging in sexual activity. A picture of nude or semi-nude child may constitute illegal child pornography if the posture is sufficiently sexually suggestive. The

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[20]The Protection of Children from Sexual Offences Act, 2012 Section 8(1)
[21] *ibid* Section 8(3)
[22] *ibid* Section 8(1)
[23] The Information Technology (Amended) Act, 2008 Section 67B
[24] *ibid* Section 67B(c)
[25] *ibid* Section 67(e)

Committee has suggested a definition of "sexually explicit" which must be inserted in Section 2 (da) of the POCSO Act, 2012.

> '(db) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act; (dc) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; (dd) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; (de) any written material, visual representation or audio recording that depicts or describes a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity.'

Pornography is a term primarily used for adults engaging in consensual sexual acts distributed to the public. Use of the term 'child pornography' may imply the child is a willing participant. Instead of using child pornography it would be ideal to use the term "child sexual abuse material". Many countries define 'Child sexual abuse material' as including Computer/digitally generated child sexual abuse material. The Budapest Convention defines them as 'realistic images of a child engaged in sexually explicit conduct.[26]" Computer generated child sexual abuse material may be artificially created without the use of children. It may include cartoons. Hand drawn pictures, pseudo photographs, blended images. These images are still not being considered as an offence in many countries. child.

Liability of Intermediaries

Intermediaries must play an active role is preventing and prohibiting child pornography. An intermediary must not host any child sexually explicit content and report such offences to the Special Juvenile Police Unit.[27] Any such content must be reported immediately to the lawful authorities. The Delhi High Court found that there was a lot of offending content on social networking sites like Facebook, Google and Youtube and directed them to introduce effective measures to remove such content.[28] The Supreme Court of India imposed a fine of one lakh rupees on Google, Facebook, Yahoo, Microsoft, Whatsapp for failure to remove offence child pornographic content.[29]

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

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[26] Article 9(2)(c)
[27] Rule 11 of the Protection of Children from Sexual Offences Rules, 2020 a
[28] *Ms X .vs. State & Ors* W.P. (Crl.) 1080/2020
[29]In Re: Prajwala Letter Dated 18.2.2015 Videos Of Sexual Violence And Recommendations (Crl.)No(S).3/2015

A social media intermediatory is liable for any material posted by a user which is defamatory, obscene, indecent and harmful content or content taken without the permission of the child. The intermediatory must terminate such users who do not abide and obey the rules framed by them. The intermediatory must prohibit the hosting of unlawful content on the websites. Information collected from the users must be saved for 180 even after cancellation of the account. Cooperate with government order swiftly within two hours of receiving the order. Report cyber security incidents and share related information with the Indian Computer Emergency Response Team.

A Grievance Officer must be appointed. The contact details of the Grievance Officer must be published on the website. Intermediaries must receive complaints within twenty-four hours and make all efforts to dispose them quickly specially when the content posted is sexual explicit material. Intermediatory must appoint a Chief Compliance Officer who is responsible for third party acts. Appoint a Nodal Officer and a Resident Grievance Officer. Publish reports every month. Intermediators should use technology to trace the first originator of the content which depicts 'rape, child sexual abuse or conduct, whether explicit or implicit.' The intermediators must have an address in India.

In *X v. Union of India*[30] The Delhi High Court held that photographs taken from Facebook and Instagram accounts uploaded on pornographic website without the consent of such person amounts to an offence under sec. 67 of the IT Act and that such an act, even if the photographs are not in itself obscene of offensive, without the consent of the party would amount to breach of person's privacy. The court held ' It is evident that such publication would likely result in ostracisation and stigmatisation of the person concerned in society; and therefore immediate and efficacious remedy is required in such cases.'

The Court directed the Intermediaries to remove and disable access to offending content once they receive 'actual knowledge' by way of a court order or upon being notified by the appropriate government or its agency, failing which the intermediary is liable to lose the exemption from liability available to it under section 79(1) of the IT Act. Intermediaries are not permited to say they are unable to remove the offending content. Intermediaries must disable and block the search results throughout the world.

If offending content cannot be completely 'removed' from the world-wide-web, offending content can be made unavailable and inaccessible by making such content 'nonsearchable' by de-indexing and de-referencing it from the search results of the most widely used search engines, thereby serving the essential purpose of a court order almost completely. comply with a court order directing removal or disabling access to offending content within twenty-four hours from receipt of such order. Website or online platform on which the offending content is hosted must preserve all information and associated records relating to the offending content, so that evidence in relation to the offending content is not vitiated, at least for a period of 180 days or such longer period

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[30] W.P.(CRL) 1082/2020 & Crl. M.A. Nos.9485/2020, 10986-87/2020

Efforts undertaken in India

The Government of India is committed towards eradiating and curbing child pornography. Child victims of cybercrimes can file complaints at the POCSO e-box of the National Commission for Protection of Child Rights (NCPCR). The Indian Cyber Crime Coordination Centre has started a national cybercrime reporting portal, www.cybercrime.gov.in where children can file online complaints. National Crime Records Bureau (NCRB), India has tied up with an international NGO called NCMEC (National Center for Missing & Exploited Children) and it maintains a Cyber Tipline. These organizations work together for maintaining records of missing children. The Government is working on setting up an dedicated agency to tackle trafficking in women and girls. 'Aarambh India', a Mumbai based NGO has partnered with the IWF and launched India's first internet hotline www.aarambhindia.org in September 2016 to report images and videos of child abuse online. These reports are assessed by the expert team of IWF analysts and offending URLs are added to its blocking list.

Need for Changes

According to international norms India is required to have a hotline. India is also not a member of INHOPE. India does not have requisite infrastructure in place to proactively monitor, search and remove CSAM hosted on the country's servers. It is worth noting that the UK which hosted about 18% of the global CSAM in 1996, after the IWF's intensive work on proactive search, the figure came down to just 0.1% in 2019.

India needs to amend the definition of 'child pornography', include definition of ‘cyber grooming' and 'using misleading domain names.' A code of conduct for social media platforms must form a part of compulsory school curriculum. India must have a feasible system to permit breaking of end-to-end encryption to trace distribution of child pornography, deployment of mandatory apps on all devices sold in India to monitor children's access to pornographic content and building partnership with industry to develop AI tools for dark-web investigations, trace identity of users engaged in crypto currency transactions to purchase child pornography

Concluding Observations:

India is working towards create guidelines and SOP to eliminate Child Pornography. In the United States of America there are two Acts Stop Enabling Sex Traffickers Act (SWESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). This laws create severe liabilities for intermediaries hosting child abusive content and hence are able to keep a check and maintain a balance. India needs to enact severe laws to put in place and prohibit child trafficking on the internet.

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IMPLICATIONS OF PATENT LAW ON GREEN TECHNOLOGY TRANSFER: A CRITICAL ANALYSIS

Dr. Amrendra Kumar Ajit*

Abstract: The impact of global warming in the last few decades compelled the nations to a technological shift in their industrialised economy otherwise the survival of livings on this planet would be very challenging. The developed counties coming up with various kinds of technologies that are eco-friendly and able to mitigate the impact of pollution and global warming. These green technologies are mainly in developed countries and protected under patent or trade secret regimes of intellectual property. The transfer of green to the developing and least-developed are very restrictive due to several factors. This paper mainly focuses on the impact of the patent regime on green technology transfer. Technology Transfer (TT) put successful research on the market through licensing for the use and production of the invention in large numbers. A successful TT with respect to sustainable development is inevitable to facilitate national development and increase sustainability in developing and least-developed economies. The paper mainly discusses the need and challenges regarding green TT in the south globe and related controversies with emphasizing the WTO and TRIPS practices. It also analyses the prospective measures to minimize the divide between north-south restrictive TT practices.

Keywords: Patent, Green Technology, Technology Transfer, TRIPS, Human Rights.

Introduction:

Any technology is mainly protected under intellectual property rights (IPR) within patents, copyrights, trade secrets and trademarks. The nature of legal protection differs according to the kinds of intellectual property. Patents and trade secrets are the two main intellectual properties that are directly related to the protection of green technology. The research of private organisations creates the scientific and technical know-how needed to address today's major challenges. Patents limit the use of technology, although they are in line with the goal of technology transfer for a variety of reasons. Patents that limit competition for a period provide companies with more motivation to take the necessary next steps when the technology is difficult to sell or requires additional research. Patents can also be used to raise public awareness of research findings and increase the interest of potential technology partners. They can also be used defensively, establishing a clear right for licensees to exploit research while other companies have patents on the same technology.[1] This is the source of the debate that the researcher will address in this research report.

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[1] Paul Heisey &John King, *Patenting and Licensing are Tools for Technology Transfer* (November, 2005), available at http://www.ers.usda.gov/AmberWaves/November05/Findings/Patenting.htm.

On the other hand, environmental protection is a political and ethical movement that seeks to improve and protect the quality of the natural environment through changes in environmentally harmful human activities; by adopting forms of political, economic, and social organization that are considered necessary or at least conducive to the treatment of the environment by humans; by re-evaluating humanity's relationship with nature. In various cases, environmental protection claims that organisms other than humans, and the natural environment as a whole, deserve attention in thinking about the ethics of political, economic, and social policies.[2]

Technology Transfer (TT) put the successful research in the market through licensing for the use and production of the invention in large numbers. The successful TT with respect to sustainable development is inevitable to facilitate national development and increase sustainability in developing and least-developed economies. The involvement of different stakeholders in TT become essential for speeding up the TT in different sectors. Rio Declaration recognized this long back and it specifically mentions[3]: "*States should cooperate ... by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.*" Herein begins the debate, between private licensing and forceful commercialization in the name of technology transfer for environmentalism. This paper thus addresses this crucial debate of suppression of transfer of Environment-Friendly Technology or Environmentally Sound Technologies (EST's)[4] to developing nations due to stricter IPR mechanism.

Patent Regime and Environmental Concerns:

The WTO Agreement in its essence confers crucial importance to the aspect of environment protection and sustenance.[5] The preamble of WTO commences as, "*The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living .....to protect and preserve the environment and to*

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[2] Britannica Encyclopedia, *Environmentalism?,* available at http://www.britannica.com/EBchecked/topic/189205/environmentalism.

[3]Hari Srinivas, *Technology Transfer for Sustainable Development*, available at http://www.gdrc.org/techtran/techtran-sustdev.html.

[4] Environmentally sound technologies (EST) are those that "protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes', *See* Cristina Tébar Less & Steven McMillan, *Achieving the Successful Transfer of Environmentally Sound Technologies: Trade-Related Aspects*4 (OECD Trade and Environment Working Paper No. 2005-02)(*hereinafter* Cristina & Steven); *See generally*United Nations Conference on Environment &Development, June 3-14, 1992, *Agenda-21*, ¶ 34.1, U.N. Doc. A/CONF.151/26 (June, 1992) (*hereinafter* Agenda 21).

[5]*See* Preamble, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1867 U.N.T.S. 154.

enhance the means for doing so in a manner consistent with their respective needs concerns at different levels of economic development."

It portrays how profoundly WTO attaches its concerns with the environment. The preamble also formerly states the core principle on which environmentalism works, i.e., protection and preservation of the environment.

Moreover, the TRIPS agreement, by recognising the importance of technology transfer in context to society, provides an easy way for the proliferation of environmentally sound technologies (ESTs). Art. 7[6]"Objectives" of TRIPS states, "*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*" Thus, presence of such a provision in TRIPS is hugely in favour of the technology transfer as it is the major international treaty on intellectual property law that binds most of the nations across the globe.

In addition, the TRIPS being part of the WTO agreement works on the same objectives to make world trade with reduced barriers and discriminations for promoting economic development, the standard of living, sustainable development with special attention to developing countries.[7] Thus, most of the international instruments[8] are in favour of technological transfer essential to curb environmental concerns in favour of public good.

Need of Technology Transfer to the South:

Over the past century, there have been many profound technological transformations that have contributed to advancing this world. These changes came about for shaping the future of mankind in order to realise economic and social goals has been one of the fundamental assets of human society.[9] Thus, due to such immense impact on our lives technological innovations gain crucial significance for holistic development.

But the major problem that arises is the inter-country disparity in context to technology and technological innovations. Due to this disparity in

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[6]Agreement on Trade-Related Aspects of Intellectual Property Rights, art.7,Apr. 15, 1994, 33 I.L.M. 1197, 1869 U.N.T.S. 299 (*hereinafter* TRIPS)

[7]UNCTAD-ISTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT, RESOURCE BOOK ON TRIPS AND DEVELOPMENT: AN AUTHORITATIVE AND PRACTICAL GUIDE TO THE TRIPS AGREEMENT 12 (2005).

[8]'Article 66 (2) and Article 67 of the TRIPS, require developed countries to provide technology transfer and technical cooperation. Doha Ministerial Decision of 2001, which covers implementation related issues and concerns, reaffirmed the mandatory nature of the provision.', *See* World Trade organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/17, 41 I.L.M. 746 (2002).

[9]*See* O.E.C.D., 21ST CENTURY TECHNOLOGIES: PROMISES AND PERILS OF A DYNAMIC FUTURE 3(1998).

technological capacity the north-south divide[10] has furthered.[11]Today, countries like India, which are making the transition from centrally planned economies to decentralised market driven economies, technological upgradation is a vital component of the change strategy.[12]

The flow of technological knowledge generally happens from advanced technological building capacity to a lower technological building capacity nation through different kinds of forms, methods, and procedures.[13] This flow is severely affected and suppressed by the patent regime. Thereby the virtuous relationship of technology transfer and patent law faces great criticism.

Developing countries in order to reduce the north-south divide are in need to increase their technological industrial base, but availability and accessibility of required technology certainly need of the hour for other reasons as well in today's world, most importantly the need for "Environmentally Sound Technologies (ESTs)". Environment and environmental concerns have gained a crucial significance in the recent decades. This is because of the consequences of development/ industrialisation encompassing rising temperature levels and thereby causing imbalance in eco-system. The developing and the least developed countries of the world today face a major problem in their pursuit of development.

The different kinds of industry-based pollution are a comparatively more complicated challenge in developing economies than the developed ones. The developing countries face greater structural problems and obstacles in preventing as well as cleaning up pollution. The economic obstacle is the main factor in developing countries due to the non-availability of the resources to control pollution as par with developed countries. However, the developing societies pay a huge cost in terms of health, waste, environmental degradation, reduced quality of life and clean-up costs in the future.[14]

There is no doubt that technological innovation can help realise environmental objectives and more so in a less costly manner. Thus, understanding the role that technological innovation can play in achieving environmental objectives is important. In pursuance of such an understanding,

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[10]*See* Jean Philippe Therein, *Beyond the North-South Divide: The Two Tales of World Poverty*, 20(4) THIRD WORLD QUARTERLY 723 (1999).

[11]*See* David M. Haug*, The International Transfer Of Technology: Lessons that East Europe can learn From the failed Third World experience,* 5 HARVARD JOURNAL OF LAW & TECHNOLOGY 209 (1992).

[12] *See* S Chandrashekar, *Technological Priorities for India's Development: Need for Restructuring,* 30(43) ECONOMIC AND POLITICAL WEEKLY 2379 (October, 1995).

[13]*See* B.N.Pandey&Prabhat Kumar Saha, *Technology Transfer in TRIPS Agreement: Implications for developing countries*, 3(1) DEHRADUN LAW REVIEW 7(November, 2011).

[14]Tee L. Guidotti, *Developing Countries and Pollution*, available athttp://www.ilo.org/safework_bookshelf/english?content&nd=857170604.

only Technology transfer was made a core component of the viable climate change treaty and identified as one of the four pillars in the Bali Action Plan.[15]

The Controversy:

The actual controversy arises when the patentee attaches exclusive rights of usage to his invention. In a way such protection is righteous, as patent results from the industrious effort of an individual and therefore is awarded for such an effort.[16]The Patent system is a carefully crafted bargain that rewards an inventor in lieu of his contribution towards the society.[17]This is in pursuance with the Lockean Principle[18] on property providing the patentee with an exclusive right of limited period of monopoly in respect of the invention, i.e., right to exclude others from using that invention.[19]

Traditionally, intellectual property rights have been looked upon by economists as a tool for economic development. It is widely assumed, at least implicitly, that intellectual property rights were legal incentives for the promotion of economic development which could be addressed partly independently from the broader process of development.[20]Thus, I.P.R. laws are regarded as a part of strategic pillars to support a favourable climate for creative and innovative society.

But today it is imperative to take into account the broader context into which intellectual property rights fall. This includes the impacts of the introduction of intellectual property on economic development in developing countries, on the realization of socio-economic human rights, on environment protection and on agriculture.[21] Environmental concerns seem more important than compared to the selfish interest of the patent holder. Moreover, at present, there are several marketing techniques that favour rapid revenue generation. Therefore, the debate gets more intense when we discuss the inhibitory effect of patent laws on green technology transfer.

Private Right v. Human Right:

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[15]Ruth L Okediji, *Intellectual Property Rights and the Transfer of Environmentally Sound Technologies*, 67 COMMONWEALTH 2(December, 2009).

[16]*See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 291(December, 1988).

[17]NatcoPharmaLimited v Bayer Corporation, Compulsory License Application No.1 of 2011 (Controller of Patents Mumbai) (Unreported).

[18] "Every man has a right to own the labour of his person", J.P. Day, *Locke on Property*, 64(16) THE PHILOSOPHICAL QUARTERLY 208 (July, 1966); *See generally*JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 1690, §27.

[19]*See* SIMON THORLEY, RICHARD MILLER, GUY BURKILL, COLIN BIRSS& DOUGLAS CAMPBELL, TERRELL ON THE LAWS OF PATENTS 1(16TH ED., 2006).

[20]PHILIPPE CULLET, INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT 1 (2005).

[21]*Id*, 31.

From its very nature, a right cannot be exclusive. Whenever a right is conferred upon the patentee, it also accompanies obligations towards public at large. These rights and obligations, if religiously enjoyed and discharged, will balance out each other. A slight imbalance may fetch undesirable results.[22]

This is supported by article 7 of TRIPS, when it states that the technology transfer should be *"…in a manner conducive to social and economic welfare, and to a balance of rights and obligations".*[23] When it states balance of rights and obligations should be maintained it recognizes the importance of technology in curbing the environment pollution and climatic change. Hence, when a private right is enjoyed by the patentee on his invention he should also take into consideration the duties that attach in respect to the needs and requirements of mankind.

Thus, the debate over whether private rights should be given preference over the right to environment is very intense at present. Some followers of Locke also believe that Locke frequently argues (and most people will perhaps agree) that claims of need have a high moral priority, and in the case of initial appropriation of resources it is difficult to see that other competing claims could be stronger than claims of need.[24] It is thus, important that in this era people recognize that current property rights in such resources are more like usufructuary rights than full-blown property rights: as in more standard cases of usufructuary rights, owners possess a limited property claim that affords them the right to use and to consume the fruits of property, but no right to damage or destroy its substance.[25]

Since most contemporary property theorists understand property law in essentially Lockean terms, this conclusion has potentially important implications for environmental law. It has often been argued that environmental regulations are unjustified.[26] But, this approach is unjust only at individual level because it is said to infringe the right to private property. However, the essence of this approach is to achieve sustainable development which is fully justified as a right of whole human race, present and future.

Advancement in Marketing Techniques:

Another significant point of argument is the change in marketing trends adoption of newer techniques. Due to globalization and the consequential nurturing of marketing techniques which provide sufficient advantage to the inventor/innovator to market or use the product, the use of patent law seem unreasonable at times. For e.g. First mover's advantage gains the inventor an advantage to grab a strong market foothold by being the only provider of the

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[22]*Supra* note 17.

[23]*Supra* note 6.

[24]Clark Wolf, *Property Rights, Human Needs, and Environmental Protection: A Response to Brock*, 4(1) ETHICS AND THE ENVIRONMENT 108 (Spring, 1999).

[25]*Ibid.*

[26]*Id.*, 109.

product. The first mover's advantage is a managerial hypothesis wherein the entrepreneur has, by bringing his product first to the market, the primary opportunity to convince the consumers of the need of such a product.

Thus, it is the advantage gained by the initial "first-moving" significant occupant of a market segment. It may be referred to as Technological Leadership. This advantage may stem from the fact that the first entrant can gain control of resources that followers may not be able to match. First-mover advantages accrue to a firm that gains a first-mover opportunity (through proficiency or luck) and is able to maintain an edge despite subsequent entry.[27] Such techniques have reduced the need for patent laws as the proliferation of a product happens at a much higher rate compared to the past and therefore accrue sufficient revenue proportional to the efforts put in. Thus, the introduction of aiding marketing techniques tends in favor of relaxing the patent laws as the benefit that patent protection thrives to do is already achieved by integrating such marketing techniques.

After studying the arguments, one finds enough substance in the opinions of the scholars, teachers and environmentalist who support transfer of green technology and want lenient patent laws in order to easy proliferation of ESTs from the developed nations to the south. In reality, this will in turn enable the south to pursue environmentalism in practice and help safeguard the environment from further degradation and climate change and even mitigate the damage already done. While on the other hand the contemporary thinking and practice, i.e., exclusivity of right of the creator/innovator/inventor over the property created, still beholds good in the society at present as in the pursuance of such thinking only majority of nations signed and ratified TRIPS. Hence, in deciding between stronger patent laws and easy transferability of green technology, one has to really ponder on an equitable scale to choose the wiser way.

Green Technology Transfer and Patent Laws:

The importance and need of the technical advanced technologies has already been shown as has the constant amplification of development imbalance. The process of innovating, producing and using a technology requires heavy expenditure by the country for basic research, applied research and blueprinting of the technology and due to the cost of the basic process, developing countries are unable to invest in Research and Development (R&D) whose expenditure ranges in terms of institutions, equipment and number of trained scientists and technologists, and hence a virtual monopoly of determining the frontiers of knowledge as much as developed countries. This would hardly be a problem if the developed countries were more sociable about their research but since the efforts to solve problems plaguing man are dependent on the country where the work is carried on and based on their own priorities. The problems, technical and scientific, that afflict developing

[27]Marvin B. Lieberman and David B. Montgomery, *First-Mover Advantages* 6 (Stanford Business School, Research Paper No. 969, October, 1987).

countries differ in both magnitude and description and thus the interests of the third world are often lost.

The TRIPS Agreement enforces minimum criteria for countries to adopt in almost all areas of IPRs. These standards are consequent of the legislation of developed countries, and they impose more stringent legislation as compared to the existing legislation in most of the developing countries to all WTO members, as has been stated before. This results in the countries having to create or amend national laws to comply with the TRIPS obligations. The agreement has significant repercussions for developing countries concerning the conditions for their access to and employment of technology and their economic and social progress. The intensification and amplification of IPRs have an adverse effect on the conditions for technology transfer. Patenting makes technology transfer difficult and costly. The natural consequence is increased royalty payments required by technology-holders along with a right to bargain highly. They have the right to refuse the transfer of the technology and block industrial initiatives by other parties. This will restrict the prospects for economic and industrial development in developing countries.[28]

The contradictory argument is that the developed countries fear that weak intellectual property rights would lead to lack of control over the transferred technologies, which would make them an easy target for piracy.[29]This fear of economic loss of the developed nations is presently catering to accrue to the much foreseeable damage of environmental degradation and climatic change. The reasons that the developed country state are that the lack of sufficient IP protection in developing countries deprives patent holders from licensing technologies into developing country markets. They say that further dilution of patent regime on ESTs would discourage investments in R&D and relaxation of IP regime could lead the technology owners to protect them as trade secret.[30] Thus as the developed countries argue in favour of stronger patent protection the developed countries seek a relaxation by way of soft laws such as the Stockholm Declaration and Rio Declaration allowing technology transfer.

The IPR regime thus has compulsory jurisdiction. The Stockholm Declaration is a soft law although it claims to be politically binding[31]. The Rule of Additionality mandates the transfer of environment friendly technologies

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[28] Third World Network Breifing,*Ten Questions On Trips, Technology Transfer And Biodiversity*, available at http://www.twnside.org.sg/title/trips10-cn.htm (Last accessed November 10, 2013).

[29]*See* Anna Dahlberg,*Supra* note 25.

[30]Centre for WTO studies- Indian Institute of Foreign Trade, *Transfer of Technology in Environmentally Sound Technologies*, available at http://wtocentre.iift.ac.in/FAQ/english/Transfer%20of%20Technologies.pdf (Last accessed November 10, 2013).

[31]Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC JOURNAL OF INTERNATIONAL LAW 171 (1996).

which is derived from Rule 9 and rule 12 of the Stockholm Declaration as given below:

> "*Rule 9 - … accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required*"
> "*Rule 12 - Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose*."

The WTO signed the maximum number of countries, which is often claimed as the strictest international law, can enforce the patent rights of other countries no use of technology without paying royalty. Thus between binding Patent law and Soft Environment law – Patent law wins.

The basis of patent laws is to promote Research and Development (R&D) by ensuring that those who invest in R&D get a patent right over the invention. In the age that we live in, the dynamics of marketing have changed; technology-based marketing is a common phenomenon where knowledge is spread through a network of distribution channels. If the object of patent law is to promote R&D, utilising the tools of the information age the innovator can get First movers Advantage, Brand Creation and Trademark on his established Brand. The availability of the technology in the public domain will only benefit future R&D and the innovator would also not be at a loss because once an innovator launches his product brand value get recognition and he gets a trademark over it you can have first movers' advantage.

In the Rio Declaration, States declared that they should cooperate "*… by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies*".[32] Agenda 21 devoted a whole chapter to the transfer of technology, and numerous initiatives were launched to facilitate technology cooperation and transfer between developed and developing countries.[33]

The TRIPS agreement in its Art. 7, states that the objective for protection of a patent is the dissemination of technical knowledge while Art. 67 iterate that member shall provide on request technical and financial cooperation and Art. 66 while providing a levy to least developed countries to create a viable technological base, it instructs developed countries to incentivize their enterprises and institution to promote technology transfer to the least developed countries.

Chapter 34 of Agenda 21 states that "*to develop sustainably, all countries need access to and the capacity to use technology that preserves resources and*

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[32] *Supra* note 30.

[33] *Ibid.*

protects the environment". To promote this principle, Agenda 21 encourage revisions to national laws on foreign investment to require evaluation of the environmental impact of technology being transferred to developing countries and the creation of information networks to enable developing countries to make informed choices about the potential environmental effects of imported technologies and industrial processes.[34] Thus while the impact may as well be seen, the law is straightforward on the aspect with its intention, objective and provisions all promoting technology transfer.

Concluding Observations:

The TRIPS Agreement while making the Intellectual Property Rights law more stringent has also included in it certain flexibilities inherent in the provisions related to transfer of technology. Thus, while the IPR laws have become harsh it has not hindered the cause of technology transfer mandated by environmentalism. The Earth Summits did not reach a resolution on the issue of how to adequately protect intellectual property rights while encouraging the transfer of clean and energy efficient technology to poorer countries. Countries such as Japan and Germany see significant business opportunity in technology transfer provisions which require environmentally sound technology. The uniform IPR laws promote the level of protection a foreign patentee would feel in a country that has patent laws similar to his own and thus increase the chance of granting a license for use. Article 31 of the Vienna Convention on the law of Treaties (1969) states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given", thus, according to the TRIPS Agreement, IPR have been designed not to thwart technology transfer in any way but to benefit society by providing incentives to introduce new inventions. They, when executed in accordance with the objectives of the agreement "promote technological innovation and dissemination of technology in a manner conducive to social and economic welfare". Thus, the law itself is compatible. The actual effect as has been shown in the chapters might seem contrary to the compatible law because of the stagnation of the flexibilities the TRIPS Agreement imbibes to further the purpose of technology transfer.

Along with the conclusions of the research, the researchers also recommend the enactment of laws that grant a levy in taking a license for environmentally sound technologies. The researchers also noticed that there is ambiguity in the definition of terms 'technology transfer' and 'developed country' and it lacks clarity. The fact that no effort of the environmentalism mandated technology transfer affixed any liability on any country or group of countries, in any treaty. The researchers also recommend affixation of responsibility on developing countries to develop the capability for different IPRs regulation, especially in the matter related to special public interest like in the cases of technology transfer, know-how and subsequent support and assistance. These must be given high priority in technical cooperation programs to benefit their own interests.

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[34] Erin B. Rothenberg, *The 1992 Earth Summit: Effect on U.S. and International Businesses* 2 (New York Office Environmental Practice Group, July, 1992).

ALGO-TRADING: AT THE CROSSROAD OF INTELLECTUAL PROPERTY AND SECURITIES LAW

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Abstract: We all have booked "Tatkal Tickets" or a concert pass online for which a considerably large pool of people tries getting their hands on. What do people do to increase the probability of getting these tickets? People often use browser extensions/plugins, which are designed to do things that one might not do with regular browsing. Algorithmic trading, more commonly known among investors as "Algo-trading" or "automated trading" or "black-box trading," is a way to execute quick trade when the retail investors are queuing to get their trade executed. However, unlike a traditional browser extension, Algo-trading software was pretty pricey and only restricted to big investors like Qualified Institutional Investors. However, now that retail investors are also getting a taste of it through retail investment apps providing algo-trading, it becomes crucial to have a stricter regulatory oversight. But the problem starts when these algorithms that can impact billions of dollars in the Capital Markets are protected as Trade Secrets, creating a vast disparity among investors. A need has arisen in the last couple of years to reduce the conflicts of IP and securities law, and bring algos under the IP umbrella.
Keywords: Algo-trading, IP, Securities law, Capital Markets.

Introduction:

Algorithm Trading helps traders execute trades at a pace that is impossible for a human to attain with the help of softwares. Algorithms are the instructions that the software follows in order to execute the trade with utmost precision and speed. The use of algorithm trading was allowed by SEBI in 2008, and its usage has grown considerably in the last couple of years. Earlier, the access to algo-trading was restricted to big investors, e.g., Qualified Institutional Investors, but with the advent of fintech companies, there is an instrumental change in the algo-trading ecosystem in the Indian and global capital markets. Now that retail investors are also into play, it becomes crucial to understand the working of algorithms in general, the Intellectual Property(IP) protection algorithms received across the globe, and the impact it could have on the lives of millions of retail traders trying to make that extra buck from the bull and bear fight of the capital markets.

Algorithms: Understanding the Working of Algorithms

Algorithms are the set of instructions given to a computer to execute a task. We make hundreds of decisions in our everyday lives right from when we wake up—wearing our own clothes from the wardrobe among all the other clothes lying over there to picking a toothpaste instead of a face wash to brush our teeth. Why do we never confuse toothpaste with face-wash?

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Our brain follows an algorithm that has developed after years of evolution by observing things since childhood. Similarly, a computer algorithm is never confuse with the designated task. In algo-trading, the software is designed to perform a set of instructions, and these instructions are algorithms. For instance, a securities trader commands the software to execute a trade once it reaches a specific price point. The software waits until the price point is reached as directed by the set of instructions(called algorithms), and then it executes the trade without waiting for any explicit instruction from the trader. So, in a nutshell, the algorithm tells the computer to do the task with the help of codes that communicate the commands of the algorithm.

Algorithms Used in Algo-trading

Algorithms are defined as per their usage in different stages of trading. First of all, the algorithm is tested for past stock market performance to ascertain its viability in present times. In other words, if the present algorithm had been used in the past, how would it have performed then? This is called backtesting. So, algorithms are defined based on their pre-trade analytics, execution stage, and post-trade analytics.[1] But it's better to keep the discussion restricted on how the algorithms impact the trading and its technical implications when juxtaposed with new-age technology like AI, ML, and Blockchain.

Individuals and Firms trading with Algo-trading software are usually interested in **Predictive algorithms**. Predictive algorithms predict future results based on large data sets from the past. The conflation of AI and ML with algo-trading stems from these predictive algorithms that use Machine Learning to learn past data and then give output without any human intervention. The output of an algorithm is the only thing that concerns the capital market regulators. But the use of AI and ML have raised eyebrows on the impact of algorithms in general and Predictive algorithms in particular.

Algo-Trading and the Global Capital Markets

In the late 80s and early 90s, the US financial markets started adopting algo-trading for ultra-fast execution of trades. In 1998 the US SEC (Securities Exchange Commission) authorized HFTs (High-Frequency Trading). It completely turned the table for big investors who could execute a trade with more than 1000 times the speed with which the trades were executed manually by human intervention. Later on, European, Latin American, and Asian markets adopted it, but it was primarily restricted to institutional investors with deep pockets and large trade volumes.

The capital markets in India have adopted algo-trading at a much faster pace than most of the developed world. In fact, it constitutes 1/3rd of total trading volume in just a span of over a decade in India's case. While Algo-trading is

[1] https://dea.gov.in/sites/default/files/NIFM%20Report%20on%20Algo%20trading.pdf

between 60-73% of the entire equity trade volume in the US capital markets, it is slated to witness a CAGR of 10.1% between 2018-26.[2] With the evolution of technology, the pace of trade has increased exponentially with evolved computers coupled with the new age tech like AI(Artificial Intelligence) and ML (Machine Learning). In FY21, the Indian capital markets witnessed a ginormous rise in retail investors, with 14.2 million new accounts opened on CDSL(Central Depository Services Ltd.) and NSDL(National Securities Depository Limited).[3] The markets have also been encouraging its growth as it helps them reduce human intervention at most levels of operation. In fact, the reduced human intervention has a dual advantage to the industry. First, reduced human capital expenditure, and second, a more efficient system. This has led to an increased reliance on algo-trading by big investors. Now, even retail investors are getting access to algo-trading via third-party APIs(Application Programming Interface) like Zerodha, Upstox, Paytm Money, etc. that warrants an even stricter regulatory oversight by SEBI.

Algo-Trading Programs and IPR

Algorithms have certainly been at the forefront of automation and the genius of the entire coding taxonomy. The need for a regulatory oversight becomes of utmost importance as more and more complex algorithms are made with the help of AI and ML with virtually no human oversight on its development. As long as the algorithms are open source, there is no problem whatsoever, but they begin when protected under Copyright, Trade Secrets, or other IP laws.

The laws related to patents in India, The Patents (Amendment) Act 2002 (No. 38 of 2002), came into effect on 20th May 2003. As per the CRI (Computer Related Inventions) guidelines released by the Patent Office, "*What is important is to judge the substance of claims taking a whole of the claim together. If any claim in any form such as method/ process, apparatus/ system/ device, computer program product/ computer-readable medium falls under the said excluded categories, such a claim would not be patentable. However, if in substance, the claim, taken as a whole, does not fall in any of the excluded categories, the patent should not be denied.*[4]" Now, this set of guidelines accentuated the already existing ambiguities in IP laws regarding the patentability of algorithms. Indian laws explicitly bar algorithms from being patented. But in the new age technology wherein AI and ML can automatically optimize the algorithms to reduce the latency and predict the working of other algorithms, the moot question regarding patentability is still unanswered, which leaves algorithms dwindling between different IP laws. We will analyze algo-trading from the lenses of varying IP laws.

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[2] https://www.businesswire.com/news/home/20190205005634/en/Global-Algorithmic-Trading-Market-to-Surpass-US-21685.53-Million-by-2026

[3] https://economictimes.indiatimes.com/markets/stocks/news/is-this-the-era-of-the-retail-investor/articleshow/87236474.cms

[4] *Guidelines for Examination of Computer Related Informations (CRIs)- https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_86_1_Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI__.pdf*

Algo-Trading and Copyright

The protection accorded to algo-trading software stems from Article 4 of the World Intellectual Property Organization Copyright Treaty(WCT). It provides for the protection of computer programs under Article 2 of the Berne Convention. Even section 10(1) of the TRIPS(Trade-Related Aspects of Intellectual Property Rights) agreement accords protection to computer programs. It is very easy for an organization or an individual software developer to get protection for their software, as this is reproduced and used by many people in most cases. But the problem begins with algorithms used in trading, which is pretty much different from software. The reason which makes the IP protection for trading algorithms so tricky is that they are only used; there is no question of reproducing or disseminating. The problem with IP regimes across the globe is that there is barely any protection for algorithms. They aren't protected by copyright laws in India, the US, or the EU. Even the WCT doesn't accord any protection to algorithms in Article 2[5]. An algorithm is not an expression of ideas. So, none of the IP regimes in the world is ready to accord copyright protection to algorithms.

Algo-Trading and Patents

The Indian Patents Act, 1970 ensures protection to Computer Related Inventions which helps inventors get a patent for their work in the field of Information technology to Artificial Intelligence. But there are certain restrictions too, and computer algorithms feature in that list of items that can't be patented. The reason for excluding algorithms is in section 3(k)[6] of The Indian Patents Act, 1970 which excludes computer algorithms. Since algorithms aren't defined anywhere in Indian statutes, we can refer to its meaning from the Oxford dictionary, which defines 'algorithms' as "a set of rules that must be followed when solving a particular problem. " But when it comes to computer programs, they are often seen from the perspective of an algorithm, as they can bring substantial change in the working, application, and efficacy of computer programs. And the genesis of patent laws lies in the fact that it's not the form in which an invention is claimed important; instead, the underlying substance that matters the most to the examiner.

The legislative intent in this regard is pretty apparent if we see The Patents (Amendment) Act 2002 (No. 38 of 2002). Section 2(1)(j) defines the term invention as "*a new product or process involving an* ***inventive step***[7] *and capable of industrial application.*" While defining the inventive step, the parliament inserted the word

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[5] Article 2 of WCT- Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

[6] Section 3(k) excludes a mathematical or business method or a computer programme *per se* or algorithms by not considering them as invention within the meaning of the act.

[7] Inventive step is defined in 2(1)(ja) as "*a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art*".

"economic significance" to clear the air on the wide economic implications of computer programs in the future.

When seen from the perspective of algo-trading, a slight change in algorithm can dramatically bring down the latency in executing trades or analyze the past data to predict future trends. So, the economic significance can be pretty broad in the capital markets as every second million dollars worth of trades occur, which directly impacts the Indian and global economies. The capital market's behavior also influences the foreign investments trends. Thus, bringing algorithms used in algo-trading within the purview of patents will save the interests of the inventors, and regulatory oversight can be ensured.

Countries across the globe are realizing the importance of bringing algorithms under the purview of patents. The European Commission confirms that CIIs(Computer-Implemented Inventions) are patentable, provided their method claims contain computer-executable steps, or perform a certain functionality when deployed by a processor on a computer-readable medium hosting a computer program.[8] However, even in Europe, the US, the UK, there is no uniformity in rules regarding patentability. It is expected that the increasing use of AI and ML in the development of computer programs and self-improving algorithms will undoubtedly necessitate the need to give patents to computer algorithms too. The securities law will certainly pitch in to make this possible as the intersection between the IP and securities law will directly impact the global economy and capital markets.

Algo-Trading and Trade Secrets

Trade secrets are confidential information and are at the core of the competitive advantage enjoyed by companies, firms, or individuals. For instance, Google's search algorithm was developed in 1997, and it is one of the most safely guarded trade secrets of the world. Other trade secrets are Kentucky Fried Chicken(KFC) recipe, Coca-Cola formula, etc. Trade secrets help corporations have the edge over their competitors in the market. Since we have already discussed the limited avenue to safeguard the algorithms in different IP laws, a trade secret is the most preferred way by companies in contemporary times to keep their algorithms safe. Companies use trade secrets because they can't risk the algorithms to be shared in the open. Once someone gets access to an algorithm, that person can develop another algorithm that takes similar steps to reach the end result. And no IP law can stop such theft as it will be an altogether different algorithm. To simplify, let's understand with an example that an investor can get a patent for the knife's design, but the person can't get a patent for cutting fruits. In the case of algorithms copying it and coming up with a new algorithm is not an arduous task.

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[8] A Strowel and S Utki, 'The Trends and Current Practises in the Area of Patentability of Computer Implemented Inventions Within in the EU and the US '(2016) Final Report for The European Commission, 16.

Algo-trading firms spend millions developing the best in class algorithms to maintain an edge over other traders in the capital markets. Since they are protected under the trade secrets, even SEBI or most capital market regulators have limited options to assess their working. The intersection of IP and Securities law creates a considerable difference to retail traders and even to new entrants among the firms.

Algo-Trading and Securities Law in India

Securities and Exchange Board of India (SEBI) allowed algo-trading from 2008. Since then, there have been many reforms to make the markets more accessible to a more extensive section of traders and investors. The reforms aimed to make the trading process fair and free from glitches to attract more companies to access the markets for raising capital. Algo-trading was one such reform to make Indian stock exchanges at par with the world's leading exchanges. Capital market reforms are aimed to utilize India's technological advancement to democratize market access. When it comes to the democratization of capital markets, SEBI placed certain checks while allowing Algo-trading[9]. One of the checks that interests us for the discussion on Algo-trading is testing new algos by stock exchanges and SEBIs regulatory oversight.

Testing Of New Softwares and Algos by Stock Exchanges

SEBI rules mandate mock trading sessions at least once in a calendar month. The mock trading sessions are meant for testing new software, algos, and any change in the functionality of existing software. It is pretty much everything that Indian capital market regulators do in testing software and algos. However, in the name of testing, there is an inadvertent delay faced by market participants. They have to wait for at least a month to introduce new software or algos that might decrease the latency or increase the pace of trade execution.

The moot question that arises is why there is a hurry for market participants to introduce new algos? It also stems from the regulations put forward by the SEBI in the name of the 'Co-location or Proximity Hosting' facility. In crude terms co-location facility enables certain traders who are in close proximity to exchanges to have quicker access to sending information like trade/order data, sending orders to the trading system of the exchanges much faster than non-co-located trading members. The cost of getting a co-location hosting starts from INR 10 lakh/annum, and even those with sound financial capability are deprived of getting co-location hosting. SEBI has advised the stock exchanges to give equitable access to their co-location facility[10]. These guidelines haven't materialized yet, and traders are facing their brunt.

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[9] Circular No. CIR/MRD/DP/09/2012 dated March 30, 2012, on 'Broad Guidelines on Algorithmic Trading'.

[10] Circular No. CIR/MRD/DP/07/2015 dated May 13, 2015

To answer the above question, one must understand the disparity between co-located trading members and others. Those in close proximity to the exchange have considerably lower latency than those who aren't. So, the next question that might come is about latency and its effect on trading. In simple terms, latency is the time interval between the placement of order and trade execution. The lower the latency, the faster the pace with which the trades will be executed, giving traders an edge over competitors. Since it's clear that latency depends on distance, a co-located member is undoubtedly at an advantage over others. Traders rely on advanced algos that give them ultra-high-speed execution to bypass the hurdle created by co-location hosting. The algos help traders gain much higher speeds, which somewhat balances the co-location hosting factor.

The Overlap of IP and Securities Law

The securities law is focused on giving a level playing field to traders and investors—the mandate of SEBI to protect investors, highlighted in the preamble of SEBI in Sahara's case[11]. However, the recent judgments by Indian courts have also widened the scope and scale of software programs being patentable. The overlapping domains of these laws are bound to create a conflict since an algorithm can bring a substantial change in the execution of trade in capital markets. Since there is a significant incentive in creating such algorithms that can dramatically change the trading, there is a growing demand to make them patentable. Indian courts have also indicated that in Ferid Allani v Union of India[12] ,the Delhi High Court clarified that the patentability bar only applies to "computer programs per se," not all inventions based on computer programs. The court further clarified about the new-age tech and held that "*modern technologies like Artificial Intelligence (AI) and Blockchain necessarily are computer-driven — Patent benefits in such cases cannot be impeded by taking restrictive view of S. 3(k) because this would be contrary to the trend in the rest of the world."* There is a growing use of AI and ML in the algo-trading, which necessitates the need for IP protection. A very famous case of Sergey Aleynikov, who was a Goldman Sachs computer programmer, made huge gains by developing an algorithm. After a year, he left Goldman Sachs and passed on the algorithm by violating the non-competition agreement to a hedge fund. Later, the courts convicted Sergey of corporate espionage. Several other cases on similar lines warrant the need for IP protection in algorithms.

However, in light of the circulars released by SEBI seeking a strict regulatory regime, it will be an uphill task for the legislature and judiciary to strike a balance between economics and intellect. Since ML can quickly analyze past data, and AI can change the algorithms, it will be increasingly difficult for regulators to assess algos in real-time. In its consultation paper titled, "Algorithmic Trading by Retail Investor," SEBI hasn't stressed reducing the testing requirements that make market participants wait for a month to test the algos. If

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[11] Sahara India Real Estate Corporation Limited & Ors. v. Securities and Exchange Board of India & Anr., (2012) 10 SCC 603

[12] Ferid Allani v. Union of India, 2019 SCC OnLine Del 11867

the algos are held patentable in the future, then it might affect the rights of an inventor to use it right away.

Concluding Observations:

Companies in India need to tap the capital markets to expand and grow, and at the same time, the intellectual capital must also be preserved. The areas of conflicts and overlaps shouldn't become a hurdle in a country's capital market's growth. Regulators across the globe are trying to chalk out strategies that protect both the investor and inventor. To make things less cloudy for investors, SEBI also needs to put out a broad set of guidelines in consultation with the union government, regulators from other countries, and market participants. A balanced approach between the IP and Securities law will protect investors' interests and incentivize inventors. Amid the rising instances of cyber threats and software malfunctioning, we can't restrict the growth of technology in the name of regulatory oversight. On 6th May 2010, the day when the "Flash Crash" happened, the prices of some of the most actively traded companies crashed and recovered in a couple of minutes. In 2012, BATS Global Markets, an electronic exchange, was about to be listed on the US market, and within 900 milliseconds(9/10th of a second), the price dipped over 99% from $15.25 to 0.02 cents. So, it becomes crucial to have a robust system that doesn't let these capital markets debacles happen repeatedly. It can only be done if a more open and protected IP regime is created, in line with the global securities law.

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CONSTITUTIONAL PERSPECTIVE OF MEDIATION IN INDIA

Saurabh Rana*

Abstract: In this article, we shall look at mediation in criminal proceedings from the Constitutional perspective- we shall see as to what are the issues faced bythe present criminal justice administration system and how they are affecting the attainment of the objectives thereof. We shall discuss the fundamental aspects of mediation in this context and realize that it comes across as an effective instrument for upholding Rule of Law and providing Justice to the poor and downtrodden in society. We shall also see that the mediation has potential to reduce the drainage of state-exchequer and also to alleviate the stress upon different agencies involved in the criminal justice administration system *viz.* the police, the prosecution and the judiciary.
Keywords- Mediation, Criminal Proceedings, Victim, Imprisonment, Dispute.

Introduction:

Mediation is resolution of a dispute outside the court by mutual agreement between the parties with the help of a neutral intermediary called 'mediator'.[1] It is a structured process of dispute resolution where the decision is taken by the parties and the whole process is steered by a mediator. This process of amicable settlement is a voluntary process for both the sides- so till the time the concerned dispute is resolved, the parties are free to walk out of it. Mediation is confidential in nature- so, whatever transpires among the parties including the mediator cannot be used as evidence in the litigation proceedings if the mediation does not get through and culminates in a settlement. It allows the parties to freely put forth their respective versions and create a conduce environment to settle the matter.

Victim and Accused in a criminal case

Victim- He/She is a marginalized entity in criminal trial. Though theoretically every effort is done to bring justice to him/her but the reality is that the state does not take into consideration the peculiar circumstances and the consequent trauma undergone by him/her especially when she is a complainant against a resourceful person in the society.[2]For state, he/she exists as a mere prosecution witness in the whole array of prosecution evidence, and that's all. Victims are viewed at worst, as mere appendage to the prosecutorial process. And let me make it clear at the outset, 'punishing' offender does not 'satisfy' victim.

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[1] Refer to https://www.wipo.int/amc/en/mediation/what-mediation.html as visited on 4th July 2019

[2] See e.g. The Unnao Rape case, 2019 in the state of Uttar Pradesh

Accused- Examining crime from another perspective, not every criminal is a 'criminal by design'. [3] Keeping aside a small percentage of cold blooded intentional crimes, a large percentage of crime is committed by ordinary men under extra-ordinary external circumstances, normal individuals under irresistible impulses or by those undergoing some form of mental deficiency.

Jurisprudence of Mediation in Criminal Proceedings

Marty Price[4] rightly captures the essence of mediation in criminal cases when she observed, "…in our society's criminal justice administration system, justice equals punishment. You do the crime, you do the time. You do the time, you have paid your debt to society and justice has been done. But then this justice is for whom? Certainly not the victim…". It has been observed[5] that what a victim most wants after the commission of a crime against him is materially different from what the traditional adversarial justice system chalks out for him- punishing the offender *alone* does not bring any relief to the victim. Punishment is just a mechanical response of state machinery to the crime; victim needs much more than that and substantially different from that. Actually, the traditional Criminal Justice Administration System does not have any tailored response to crime but looks at imprisonment/fine as a token of resentment and reaction. If we look at the statistics, the ever increasing number of prison population[6] and at the same time the ever surging crime rate[7] make us realize that the punitive jurisprudence has failed. If putting people behind bars actually deters crime, we still need to lock up more people. But the question is how far should we go with this approach?[8]So in a way we can say that 'punishing' accused is just a symbolic/token exercise.

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[3] Frederic G. Reamer, Heinous Crime: Cases, Causes, and Consequences, Columbia University Press, 2005

[4] Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?* Victim Offender Reconciliation Program (VORP), Information and Resource Centre, http://www.vorp.com/articles/crime.html as visited on 27 June 2019

[5] H. Strang, Repair or Revenge: Victims and Restorative Justice,Clarendon Press, Oxford, 2002

[6] 4,18,536 in 2014; 4,33,003 in 2016 is the total prison population in India, See Institute for Criminal Policy Research, World Prison Brief; last visited at http://www.prisonstudies.org/country/india#further_info_past_trends on 30 June 2019.

[7] 45,71,663 cognizable crimes reported in 2014; 47,10,676 cognizable crimes reported in 2015; 48,31,515 cognizable crimes reported in 2016; See http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20%201916%20Complete%20PDF%20291117.pdf Last visited on 30 June 2019

[8] If we compare our situation with the most advanced nations like USA, we find similar sentiments, See Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?,* http://vorp/articles, last visited on 24 May, 2019, "…The punitive approach to justice has resulted in the United States becoming the largest jailer (per capita) in the industrialized world, with a violent crime rate that is also second to no other industrialized nation… How far should we go with this approach? Prisons have become one of our fastest growing industries and some states now have a punishment budget that is larger than their education budget."

Constitutional Roots of Mediation

Article 21, 39A and Legal Aid- Right to Life and Personal Liberty under Article 21 of the Constitution has been interpreted by the Supreme Court as including right to free legal aid and also the right to have a speedy trial. In **Hussainara Khatoon v State of Bihar**[9] it was observed by the Apex Court that **Right to Legal Aid** is part of fair, just and reasonable procedure envisaged under Article 21 of the Constitution of India. Also if we look at Article 39A, it directs the state to provide legal aid to the citizens. Legal aid merely in the form of assigning a lawyer to an indigent person is a narrow idea; in its wide connotations it must include availability from the side of state of all possible forums for resolution of legal disputes-which in today's world cannot and ought not leave aside the forum of **Mediation**. As a matter of fact, Mediation is working in different foreign jurisdictions to the satisfaction of all the stakeholders; and there is no reason why it is not adopted in India. It will certainly provide aid to poor and downtrodden in resolving their legal matters through an alternative effective forum.

Article 21 and Speedy Trial- As for **Right to Speedy Trial** within the ambit of **Article 21**, the Supreme Court in **K. Anbazhagan v Supdt. of Police**[10] observed that although this right is not mentioned specifically as a fundamental right in part III of the Indian Constitution, yet it is implicit in the broad sweep of Article 21. Mediation provides speedy justice- certainly when we compare it with the time taken in a typical traditional adversarial criminal trial. **Mediation** is a clear path dotted by the stages on 'need basis'. It definitely brings speedy justice to the stakeholders or at worst the case goes back to the court- in both cases it would not take much time.

Article 40- India is a land of villages and farmers. Majority lives in villages. Our Constitution in the form of **Article 40**gives directive to the State to ensure that local level governance is done through village panchayats. These units of self-governance are supposed to manage the grass root level affairs. Also, 73rd Amendment through which the Parliament has introduced **Part IX (Article 243A- 243O)** to the Constitution of Indiadeals with tier three local governancesupporting the spirit of local governance which also includes local dispute settling mechanism in certain conditions- **Mediation** may be a useful tool in such settings and circumstances to settle disputes amicably.

Article 46- This Article casts an obligation on thestate to make laws for providing full access to justice to weaker sections of society including SC/ST which is required for preventing their exploitation. Needless to say that providing efficient- in terms of time and costs, and transparent forums for resolution of their disputes- **Mediation** seems to be perfectly suitable on these conditions-shall ensure access to justice to them and bring them the fruits of social justice.

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[9] (1980) 1 SCC 98
[10] AIR 2004 SC 524

Article 51- This provision gently thrusts us into the direction of Alternative Dispute Resolution mechanisms.**Article 51(d)**of the Constitution encourages the state to settle disputes of international nature through arbitration. This is clearly an attempt to inculcate a culture of going for out-of-court resolution of disputes- including the mode of **Mediation**- rather than going for arduous litigation battles leading to rupture of harmonious relationships.

Article 14, 19 and 21 and Procedural Justice- Justice must not only be done in substantive aspect but also the procedural aspect is to be seen. Substantive aspect can be understood as the final product of the litigation; Procedural form is how the procedure is felt or experiences by the victim. Procedural Fairness under Article 14 has been emphasized in a number of cases[11] by the Supreme Court. In **Maneka Gandhi v Union of India**[12]the Supreme Court observed that **Articles 14, 19 and 21** together have a brooding omnipresence in the Constitution which ensures reasonableness in every state action. In **Bachan Singh v State of Punjab**[13] it was observed to the effect by the Apex Court that not only substantive but also procedural justice/fairness is a facet of reasonableness of any legal proceeding.

Preamble, Article 14, Rule of Law and Mediation- Rule of Law is an idea emanating from **Article 14** of Indian Constitution- it requires 'equality before law' or 'equal protection of law' to one and all. The Supreme Court in **KesavanandBharati v State of Kerala**[14]held that Rule of Law is part of Basic Structure of the Constitution of India. If we look at the **Preamble of our Constitution**, it says that 'We' have resolved to secure to all the citizens 'Equality of Opportunity' which would remain*un*fulfilled unless we provide to our citizens all possible forums for dispute resolution. In this light if we see **Mediation**- it serves the idea of Rule of Law by providing dispute resolving forums which are cost-friendly, speedy and affordable for the masses of this country. Hence, mediation is in consonance with the idea of Rule of Law.

Mediation as an Elixir for the Maladies

With growing interest evinced in alternative dispute resolution mechanisms in different jurisdictions world-over[15], mediation in criminal cases is now gaining currency. The aim of mediation in criminal cases is to hold offenders directly responsible to the victims and seek a suitable redressal/assistance/compensation for them. This process, on one hand, provides a window for the offenders to gauge the impact of their action/s on the victim/s and to own responsibility for that; and on the other hand, provides an opportunity for victim/s to have a one-to-one dialogue with the offender in a structured and secured setting through a mediator. As in contrast with

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[11] See e.g. Erusian Equipment and Chemicals v State of West Bengal AIR 1975 SC 266
[12] (1978) 1 SCC 248
[13] (1978) 1 SCC 248
[14] (1973) 4 SCC 225
[15] The practice of mediation in a criminal case first began in the Ontario province of Canada in 1974, and was then referred to world-over. This experiment in Elmira, Ontario in May 1974, is the earliest example of restorative reform in the justice system.

traditional criminal justice system, the mediation comes a step closer and focuses on healing of *both* sides- victim and offender, by offering such opportunities in suitable cases; due to this 'humanizing' of crime, the satisfaction levels of both sides increase manifold. Also, it does not leave any stigma[16] on the offender and thence provides him with an opportunity to lead a fresh life thus effectively reducing recidivism in the society.

As mediation was started to be adopted in criminal cases, it was mainly put into action in minor body related crimes, property related crimes and juvenile cases. However in western criminal jurisdictions, 'a number of cases involving violent bodily assaults including rapes have now been settled through mediation. Mediation has also taken place between offender/s in murder cases and the families of their victims. Various studies and cases present a great example of its effectiveness in severe violence cases, including murder cases.[17] This *win-win*approach seemingly provides solution to almost all the deadlocks in our traditional adversarial CJAS.

Concluding Observations

As said above, VOM 'humanizes' the justice system.[18] World-over criminal courts are showing inclination towards adopting mediation with the aid of new legislative inputs or accommodating it within the framework of existing legislations. It is high time that India must also adopt this wave. Mediation seems to be a better solution for all exasperating issues before traditional CJAS viz. increasing rate of commission of crime, pendency in courts, parties' satisfaction out of the result of trials and recidivism etc. Starting from minor bodily related offences, property related offences and juvenile cases, western criminal jurisdictions are adopting mediation even in severe offences, including mediation of offender with the relatives of deceased victim in murder cases.[19] Taking advantage of world's realization of how to deal with the menace of crime in a holistic way, we- in India- must also proceed at once towards that direction by providing a separate legislation for institutionalization of mediation and its tailored application across the entire range of criminal cases, including heinous offences.

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[16] John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,* Vol.1 (1) Western Crim. Rev. (1988)

[17] Mark S. Umbreit, The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research, Jossey Bass Wiley Inc., Publishers, Edition 1, 2001

[18] Mark Umbreit, William Bradshaw and Robert Coates, Victim-Sensitive Offender Dialogue in Crimes of Severe Violence: Differing Needs, Approaches, and Implications, U.S. Department of Justice, Office for Victims of Crime, Washington, DC (2001)

[19] Elizabeth Beck et al, In the Shadow of Death: Restorative Justice and Death Row Families, Oxford University Press (1stEd. 2009)

LIVE-IN RELATIONSHIP IN INDIA: IMPACTS AND CHALLENGES

Omendra Singh[1]

Abstract: Live-in relationships are increasing in India with increase in urbanisation, financial independence among women, and acceptance, though rather grudging, on the part of the society. It may be defined as domestic cohabitation between on adult couple who are not married. On the one hand it seems like a stress-free companionship without any legal obligations. On the other hand, it has many complications, responsibilities and legal liabilities. It is no longer on offence in India and many guidelines pertaining to maintenance, property and legal status of a child, T have been spelt out in various decisions of the Apex court. There are many grey areas which need appropriate attention, like official documentation, cultural issues, property rights, will and gift rights, religious status, and so on.

Keywords: Live in relationship, cohabitation, legal, Liabilities, offence, Legal status, Rights.

India is widely known as a country with strong social norms. In India, as per Hindu culture, traditions, customs, and practices, the marriage are made in heaven and celebrated here on earth. Therefore marriage in India is considered to be the highest form of social relationship. Marriage is social approval to enjoy conjugal bliss. The tragedy in our country is that without this approval many people are deprived of a normal conjugal life. In that case permission from society does not make sense. Institution of marriage then will be out of sync with the new career oriented generation. The attitude towards live-in relationships in different societies is different but its definition is the same almost everywhere. It's a kind of relationship in which a couple lives together without marrying each other and without any legal and social commitments. Despite the fact that there are scores of couples who are opting for live-in relationship, the society still attaches a stigma to such relationships. The majority looks at live in relationship as a dilution of morals, and more importantly, tradition.

Still people may live together for a number of reasons. These may include desire to test compatibility, to have financial security before marriage, etc. Other reasons include living with someone before marriage so that there are no legal complications of divorce if they decide to part ways. Some individuals may also choose live-in relationship because they see their relationships as being private and personal matters and not to be controlled by political, religious or patriarchal institutions. But the law traditionally has been biased in favour of marriage. Public policy supports marriage as necessary to the stability of the family, the basic societal unit. To preserve and encourage marriage, the law reserves many rights and privileges to married person. Live-in relationships carry none of those rights and privileges.

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Live-in relationship is a voluntary arrangement whereby two adults mutually agree to live together to conduct a long term relationships that resembles a marriage. Live in relationships are walk-in -walk -out kind of relationship. There are no strings attached to these relationships, as the relationship is free from any legal bond between the parties. The relationship does not impose the typical responsibilities of a marriage. The basic reason behind opting for live-in relationship is to test one's compatibility with other person before entering any sort of legal commitment.

In India, presently there is no law defining the status/ rights /obligations of a live-in relationship. No law at present deal with the concept at live-in relationship and its legality. The ambit of live-in relationship is very much unclear. There is no specific legislation in India on this subject. The law are in the form of courts verdicts pronounced by the Supreme Court and High Courts. It is praiseworthy that our courts have taken initiative and given some recognition to such relationships.

The Malimath Committee in 2003 paved the way for providing landmark recommendations. It is shed some light on the term 'wife' and consider a women in a live-in relationship alike wife. Therefore, the Protection of women from Domestic Violence Act (PWDVA), 2005 which is regarded as the first piece of Legislation on the subject, provided legal recognition to relationships outside the marriage by covering them under the ambit of relations in the nature of marriage. It was in the year 1978, that Supreme Court granted legal validity to 50 (fifty) years live-in relationship of a couple in the case of Badri Prasad vs Deputy Director of consolidation.

In case of *S.P.S. Balasubramanyum v. Suruttayen*[2] the Apex court held that if a man and a woman are living under the same roof and cohabiting for number of years, there will be a presumption under section 114 of the Indian Evidence Act, that they live as husband and wife and the children born out to them will not be illegitimate.

In case of *S. Khushboo v. Kanniammals*[3] the Supreme Court held that living together is a right to life. Live-in relationship may be immoral in the eyes of the conservative Indian society but it is not illegal in the eyes of Law.

Female live-in Partners have economic rights under Protection of Women from Domestic Violence Act, 2005 subject to the following conditions as laid down by the Honorable Supreme Court of India in case of *D. Velusamy V P. Patchainmmal*[4]-

(a) The couple must hold themselves out to society as being akin to spouses.
(b) They must be of legal age to marry.

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[2] 1994 SCC (1) 460
[3] Decided on 28 April, 2010
[4] Decided on 21 October, 2010

(c) The must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for significant period of time.

The judiciary's Pro-active efforts to safeguard the interest of such couples and protect them from the out-burst of the primitive and conditioned mind-set of the people is really welcoming and great indeed, but still, there is need of a separate law exclusively for this kind of relationships. There is need of legislation.

To sum up, there is urgent need of legal provisions on live-in relationships which provide a clear-cut picture keeping in mind the present Indian social context.

In India, the law is supreme and the constitution is above everything thus leading us to state that law is the only thing that supersedes the societal beliefs and stigmas. In order to wipe out the stigma which has been developed in society over the years, the existence of more open-minded legislation that provides security to such a relationship is very vital to support people who choose to opt for such partnerships. In conclusion, if a legislation is formulated in future, the existence of any uncertainty in relationships of this kind will be wiped away. Moreover, children born out of such partnerships will be benefited and get rights they deserve, mainly with respect to inheritance.

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DOCTRINE OF SEPARATION OF POWERS IN INDIA

Dr. P.K. Pandey*

Abstract: The doctrine of separation of powers, which was systematically developed by Montesquieu, is always in debate because of transgression of one organ of the State in another organ's jurisdiction or area of assigned work. It is a very significant concept as it is based on the cardinal canon of preserving and protecting the liberty of individual by mutually confining the various organs of government in its sphere. Though, this doctrine was refused to be strictly applied in India by the Constituent Assembly but later the circumstances compelled the Supreme Court of India to declare this doctrine as a part of basic structure of the Constitution. This paper attempts to give an idea of application of this doctrine in India.
Keywords: Separation of Powers, Parliamentary System, Constitution of India.

Introduction:

With the demise of Police State, the welfare state came into being which is based on the just and reasonable concept of welfare of the common people. This object of welfare state has led to multiplicity of the functions of the state. In this respect, the state started taking care of its people from cradle to grave. The result of this looking after attitude of state's government set up is germination of administrative machineries. These agencies have been given immense power to translate the vision of welfare state into reality. For this purpose, they have been given discretionary powers of numerous nature like legislative, executive and judicial. This attitude of concentrating all these functions of government in one hand has put a question mark on the relevance of doctrine of separation of powers. An attempt, in this paper, has been made to unearth the relevancy and need of this doctrine in India.

Separation of Powers: Origin and Concept

Though centuries before Montesquieu a cardinal of Germany named Nikolaus von Kues (1401-64) suggested separation of legislature, executive and judiciary.[1] The name most associated with the doctrine of separation of powers is that of Charles Louis de Secondat, Baron Montesquieu. His influence upon later thought and upon the developments of institutions for outstrips, in this connection, that of any of the earlier writers we have considered. It is clear, however, that Montesquieu did not invent the doctrine of the separation of powers, and that much of what he had to say in Book XI Chapter 6 of the De L'Espirit des Lois was taken over from contemporary English writers, and from

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[1] German News Weekly, September 5, 1964, p. 3 quoted in : B.L. Garg, "Problem of Separation of Judiciary in India", (1964) Vol. 25 *Indian Journal of Political Science* 331-338 at 331.

John Locke. Montesquieu, it is true, contributed new ideas to the doctrine; he emphasized certain elements in it that had not previously received such attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position that did most previous writers. However, the influence of Montesquieu cannot be ascribed to his originality in this respect, but rather to the manner and timing of the doctrines development in his hands.[2]

Montesquieu described the form of government as follows:

> THERE are three [s]pecies of government; the republican, monarchial and de[s]potic. In order to di[s]cover their nature, it is [s]ufficient to recollect the common notion, which [s]uppo[s]es three definitions, or rather three facts: that a republican government is that in which the body, or only a part of the people, is po[ss]e[ss]ed of the [s]upreme power; a monarchial, that in which a [s]ingle per[s]on governs by fixed and e[s]tabli[s]hed laws: a de[s]potic government that in which a [s]ingle per[s]on, without law and without rule, directs everything by his own will and caprice.[3]

Further, he said that:

> "IN every government there are three (s)orts of power: the legi(s)lative; the executive, in re(s)pect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.
> By virtue of fir(s)t, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogate tho(s)e that have been already enacted. By the (s)econd, he makes peace or war, (s)ends or receives emba(ss)ies; establishes the public (s)ecurity, and provides again(s)t inva(s)ions. By the third, he puni(s)hes criminal, or determines the di(s)putes that ari(s)es between individuals. The latter we (s)hall call the judiciary power, and the other (s)imply the executive power of the (s)tate.
> The political liberty of the (s)ubject is a tranquility of mind, ari(s)ing from the opinion each per(s)on has of his (s)afety. In order to have this liberty, it is requisite the government be (s)o con(s)tituted as one man need not be afraid of another.
> When the legislative and executive powers are united in the (s)ame per(s)on, or in the (s)ame body of magi(s)trates, there can be no liberty; because apprehensions may arise, left the same monarch of (s)enate (s)hould enact tyrannical laws, to execute them in a tyrannical manner.

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[2] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 76.
[3] Montesquieu, *The Spirit of Laws*, (*Translated from French*) Vol. I Fifth ed. (Edinburgh: Silverster Doig, Royal Exchange) Book II, Chapter 1 at 8.

> Again, there is no liberty, if the power of judging be no (s)eparated from the legi(s)lative and executive powers, were it joined with the legi(s)lative, the life and liberty of the (s)ubject would be expo(s)ed to arbitrary control; for the judge would then be the legi(s)lator were it joined to the executive power, the judge might behave with all the violence of an oppre(ss)or.
>
> There would be an end of everything, were the (s)ame man, or the (s)ame body, whether of the nobles or of the people to exerci(s)e tho(s)e three powers, that of enacting laws, that of executing the public re(s)oluions, and that of judging the crimes or differences of individuals."[4]

Moderation was chief purpose of Montesquieu's doctrine. For proper running of a State, there are, generally, three essential powers that are required by a government: the power to make laws, the power to put the laws into effect and the power to enforce the laws. In other words, governmental powers may be classified by function in threefold: (1) legislative, the enactment of laws; (2) executive, the application of laws; and (3) judicial, the enforcement of laws through legal process. However, sometimes this classification takes other forms also. It has been said that simple two-fold classification of policy making and policy executing is the most realistic description.

This doctrine has been defined by other authorities as under:

E.C.S. Wade and G. Godfrey Phillips: The concept of separation of powers may mean at least three different things[5]:

(i) that the same person should not form part of more than one of the three organs of the government, for example that ministers should not sit in Parliament;
(ii) that one organ of government should not control or interfere with the work of another, for example that the judiciary should be independent of the Executive or that ministers should not be responsible to Parliament;
(iii) that one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.

M.J.C. Vile: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way

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[4] Montesquieu, *The Spirit of Laws*, (*Translated from French*) Vol. I Fifth ed. (Edinburgh: Silverster Doig, Royal Exchange) Book XI, Chapter VI, at 164-165.

[5] Wade and Philips, *Constitutional and Administrative Law*. Ninth ed. (London: Longman Group Limited 1977) at 48.

each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[6]

C.F. Strong: The theory of separation of powers… means the complete isolation of the three departments from one another, but that, in a broader sense, it means merely that the three powers shall be in separate hands.[7]

D.D. Basu: The modern interpretation of the doctrine of separation of powers, therefore, is that one organ or department of government should not usurp the functions which essentially belong to another organ.[8]

Jagdish Swarup: The theory, that the legislative, judicial and executive functions should be performed by different bodies of persons– that department should be limited to its own sphere of action without encroaching upon the others and that it should be independent within that spheres, is called the theory of separation of power.[9]

Purpose of Separation of Powers:

The idea behind this doctrine is that if one person or body had control of two or more of these powers, their abuse would result in oppressive laws, the arbitrary enforcement of these laws and consequently, tyranny within the state. This is because one person would be able to make what laws he wished, have the power to put them into effect and also enforce them. It is thought that by keeping the three powers separate, each organ will act as a check or a balance against the other organs using their powers wrongfully.

Justice Brandies (dissenting) in *Myers* v. *United States*[10], observed that the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to void friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The aim of the separation doctrine is to guard against tyrannical and arbitrary powers of the state. Though, in face of the complex socio-economic problems demanding solution in a modern state, it may no longer be possible to apply the separation theory strictly, nevertheless, it has not become redundant and its chief value lies in emphasizing that it is essential to develop adequate checks and balances to prevent administrative arbitrariness. Thus, Jaffe and Nathanson has stated that: "Its object is the preservation of political safeguards against the capricious exercise of power; and incidentally, it lays down the broad lines of an efficient division of functions. Its logic is the logic of polarity rather

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[6] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 13.

[7] C.F. Strong, *Modern Political Constitutions*. (London: Sidgwick and Jackson Limited 1963) at 13.

[8] D.D. Basu, *Commentary on the Constitution of India*, Vol. 2 (Calcutta: S.C. Sarkar and Sons (Pvt.) Ltd. 1962) at 326.

[9] Jagdish Swarup, *Legislation and Interpretation*. (Allahabad: Dandewal Publishing House 1974) at 579.

[10] 272 US 52, 293, 47 S.Ct. 21, 84-85, 71 L.Ed. 160 (1926)

than strict classification … the great end of the theory is, by dispersing in some measures the centres of authority, to prevent absolutism."[11]

Professor Sutherland has described the purpose of this doctrine as: "Without the separation of powers, without the institution of an independent judiciary, without a champion furnished by government against government, constitutional rights would become 'ghosts' that are seen in the law, but that are elusive to the grasp."[12]

Separation of Powers in other Countries:

U.S.A.- The American people were influenced toward the principles of separation of powers both by the writings of Locke and Montesquieu and by their own political experience. Nearly every educated American of the revolutionary period was familiar with the writings of Locke and Montesquieu, and it was easy to find in American political experience, both before and after the revolution, persuasive evidence that these writers were sound on the theory of separation of powers. The swollen powers of the royal governor had been a leading cause of the difficulties between the colonies and the home government, and the over connection of power in the legislature came to be regarded as one of the chief weaknesses of government in the critical period following the revolution. In the pre-revolutionary colonial system, however, there had been some separation of powers, both the legislatures and the judiciary having enjoyed certain independent powers and a partially independent status. It was easy to conclude that a more complete separation would have been much better. The growing popularity of this idea was prominently reflected in the Massachusetts constitution of 1780. When the Philadelphia convention met in 1787, it was accepted without much question. (Chester C. Maxey)[13].

This doctrine is embodied in the opening sentences of the first three Articles of the American Constitution, commonly called the distributive clause, mentioned below:

> Section I of Article I: "All the legislative powers herein granted shall be vested in a Congress of the United States…"
> Section I of Article II: "The executive power shall be vested in a President of the United States of America".
> Section I of Article III: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish …".

Thus, the foundation of the threefold or tripartite plan – a government composed of three separate, independent and co-ordinate branches- was laid down. The

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[11] Jaffe and Nathanson, *Administrative Law: Cases and Materials* 38 (1961) quoted in: M.P. Jain and S.N. Jain, *Principles of Administrative Law*. (Nagpur: Wadhwa and Company 1986) at 23.

[12] Arthur E. Sutherland quoted in : Ronald Young, *American Law and Politics: The Creation of Public Order*. (New York: Harper & Row, Publishers 1967) at 139.

[13] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 179.

same principles of organization eventually became universal in state government and spread extensively downward into city, country and other units of local government.

In *Kilbourn* v. *Thompson*[14], American Supreme Court observed that it is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

But the experience has revealed that even in USA any rigid separation of powers is impracticable. The problems of government are interdependent. As Woodrow Wilson realized it : "The trouble with the theory is that government is not a machine, but a living thing … no living thing can have its organs offset against each other as checks, and live … Government is not a body of blind forces; it is a body of men with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their co-operation is indispensable; their warfare fatal."[15]

The modern interpretation of the doctrine of separation of powers is that one organ or department of government should not usurp the functions which essentially belong to another organ. Thus the formulation of legislative policy or the general principles of law is an essential function of the legislature and cannot be usurped by the executive. The form of government has no final effect upon the application of the doctrine, though it may limit the extent of its application.

United Kingdom-In Great Britain, which formed the model for Montesquieu's theory of the separation of powers, this principle has never been accorded a constitutional status, nor has it ever been theoretically enshrined. Montesquieu was confused in his experience of England. In England, relatively speaking there was more liberty for citizens as compared to the French of the time not because there was 'separation of powers' but because the people had struggled for it and at best in England there was sharing of powers between the King and the people not the separation of powers.

According to great English Jurist Blackstone, who was supporter of doctrine of Montesquieu, "wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."[16]

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[14] 103 U.S. 168 (1880)

[15] Woodrow Wilson, *Constitutional Government in US* (1908), p. 56 quoted in : *Supra* note 8 at 325.

[16] Blackstone, *Commentaries*, Vol. I, p. 269 quoted in : D.D. Basu, *Commentary on the Constitution of India*. Vol. 2, Fourth edition (Calcutta: S.C. Sarkar & Sons (Pvt.)Ltd. 1962) at 324.

Britain has adopted parliamentary system of government. So, there rigid separation of powers is not possible although the organs of government are easily distinguishable as –

(i) The legislature, which consists of the Queen, the House of Lords and the House of Commons.
(ii) The Executive, which consists of the cabinet, the Ministers of the Crown, the government departments and the civil service.
(iii) The judiciary, which consists of the Courts of law and the judges, who sit in them.

In Britain, there is only evidence of a true separation of powers that is in the virtual independence of the judiciary. The legislature and the executive function more by co-operation than separation. In many areas, they overlap and rely on each other. As *James Dunbar-Brunton* (The Law and the Individual) has given examples of connections between the three organs of government which offend the doctrine of separation of powers are[17]:

1. The monarch is the nominal head of all three organs of government. The legislature consists of the Queen in Parliament; the executive is known as Her Majesty's government, or the Crown; and the judiciary consists of the Queen's Courts and Judges.
2. The office of the Lord Chancellor spans all three organs. He presides over the House of Lords in its legislative work. He occasionally sits with the Law Lords in the judicial function of the House of Lords and is the actual head of the judiciary. Furthermore, he is a member of the executive and holds a position in the cabinet.
3. Parliament frequently delegates its legislative powers to the executive.
4. Parliament often confers judicial powers on the executive by giving ministers or tribunals powers to hear disputes between the individual and the State.

Donoughmore Committee has aptly remarked that in the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers. In practice, it is inevitable that they overlap. In fact, in Britain, doctrine of separation of powers is conspicuous by its absence.[18]

Separation of Powers: Indian Scenario

In Indian legal framework, the doctrine of Separation of Powers has found a partial acceptance. Although, the term separation of powers is nowhere used in the Constitution of India but the combined effect of the interpretation of different provisions of Constitution reveals the essence of the doctrine of separation of powers.

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[17] James Dunbar-Brunton, *The Law and the Individual*. First ed. (London: The MacMillan Press Ltd. 1973) at 16.
[18] Quoted in : Tej Bahadur Singh, "Principle of Separation of Powers and Concentration of Authority", (2001) *AIR Journal* 163-170 at 164.

Constituent Assembly Debates:

Though, in Constituent Assembly, on 24th November 1948 an Article 39-A (Draft Constitution) was proposed by honorable Dr. B.R. Ambedkar which was indirectly related to the doctrine of separation of powers (Article 50 of the present Constitution of India) but for complete separation of powers a new Article 40A (Draft Constitution) was proposed by Prof. K.T. Shah on 10th December 1948. Due to importance of this doctrine, a hot debate took place in the Constituent Assembly. This proposed new Article was as follows –

> "***40-A*** : There shall be complete separation of powers as between the principal organs of the state, viz., the Legislature, the Executive, and the Judicial."

In Constituent Assembly this article was supported by Kazi Syed Karimmudin and opposed by K. Hanumanthaiya, Shibban Lal Saxena, K. Santhanam and B.R. Ambedkar. Describing the importance of separation of powers doctrine Prof. K.T. Shah said, "… if you maintain the complete independence of all the three, you will secure a measure of independence between the judiciary, for example, and the Executive, or between the Judiciary and the Legislature. This, in my view, is of the highest importance in maintaining the liberty of the subject, the civil liberties and the rule of law… If contact or connection is maintained between the Judiciary and the Executive organs of the state there is also the possibility of undue influence, of misleading, of misdirecting and mis-influencing those who are appointed to interpret the Constitution, those who are appointed to be guardians of civil liberties, those who have to administer justice."[19]

Prof. Shah gave example of separation of powers in USA where this doctrine has worked for over a hundred and fifty years quite satisfactorily, where the legislature, the executive and the Judiciary are kept wholly apart.

Prof. Shah's proposal was opposed by Shri K. Hanumanthaiya because "this House is wedded to a parliamentary system of democracy and this new clause is out of place in such a constitutional structure."[20] Hanumanthaiya said, "… we have come to accept the parliamentary system to be suitable to this country and for every good reasons that system seems to be better adapted to conditions in India than Presidential executive. I think instead of having a conflicting trinity it is better to have a harmonious governmental structure." Further he said, "The powers of governing should vest with one set or people and it is unsafe for us to divide it into three equal parts and especially in the extreme degree that Prof. K.T. Shah contemplates. Even in America, though theoretically there is complete separation of powers between these three departments, we all know the party system of Government softens its rigours to a very great extent."[21]

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[19] C.A.D., Vol. 7, at 960.
[20] C.A.D., Vol. 7, at 963.
[21] C.A.D., Vol. 7, at 962.

Shri K.M. Munshi said, "… the doctrine of separation of powers which was originally put forward by Montesquieu in the middle of the eighteenth century was the basis on which the Constitution of USA was framed. But the last 150 years of experience has shown that the doctrine of separation of powers cannot be maintained in a modern state … therefore, the doctrine of separation of powers is an exploded doctrine."[22]

In Constituent Assembly, the proposal for complete separation of powers, which was proposed by Prof. K.T. Shah, was negativated by Constituent Assembly.

Constitutional Provisions:

On simply analyzing the provisions of Indian Constitution we can say that doctrine of separation of powers is accepted in India. Under Indian Constitution at both level the Union and the States, the executive powers are with the President and the Governor, the legislative powers are with the Parliament and the State Legislatures and the judicial powers are with the Judiciary (the Supreme Court, the High Courts and Subordinate Courts). In *Golaknath* v. *State of Punjab*[23], Chief Justice Subba Rao stated that: "The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. They should function within the spheres allotted to them.

But, when we study carefully the constitutional provisions of Indian Constitution, it is clear that the doctrine of separation of powers in India, in its strict sense, is not accepted. There is no provision in the Constitution itself regarding the separation of powers among the three organs of government.

As *Upendra Baxi* has also said 'in India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.'[24]

Article 50 of Indian Constitution reads as under:

> The state shall take steps to separate the judiciary from the executive in the public services of the state.

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[22] C.A.D. Vol. VIII, at 219-220.
[23] AIR 1967 SC 1643
[24] Upendra Baxi, "Developments in Indian Administrative Law", p. 132-173 at 136, in : A.G. Noorani (ed.), *Public Law in India* (New Delhi: Vikas Publishing House Pvt. Ltd. 1982).

This directive is but an offshoot of the famous doctrine of separation of powers. The chief purpose of Article 50 is independence of judiciary. A free, independent and impartial judiciary is the pillar of any democracy. Law Commission of India, in 14th Report, Vol. II, Chapter 41, has described the real purpose of Art. 50 as, "… to ensure the independent functioning of the Judiciary freed of all suspicion of executive influence or control, direct or indirect. It incidentally ensures that officers will devote their time entirely to judicial duties and this fact leads to efficiency in the administration of justice."

Overlapping of Functions of State Organs:

The Indian Constitution merely states that "Executive power of the Union shall be vested in the President [Art. 53(1)] and "the executive power of the state shall be vested in Governor … "[Art. 154(1)]. All executive action of the Government of India shall be expressed to be taken in the name of the President [Art. 77(1)]". But there is no any express provision that legislative and judicial powers shall be vested in any person or organ. In India, there is not only a functional overlapping but there is personnel overlapping also.

India has adopted parliamentary system in which separation of the executive and the legislature is impossible. In India, the executive is the part of the legislature. President acts on the advice of Council of Ministers [Art. 74(1)]. He can be impeached by Parliament for violation of the Constitution [Art. 56(1)(b) with Art. 61].

The President being the executive head is also empowered to exercise judicial function as Article 103 empowers the President to decide cases of disqualification of members of the Parliament. Art. 103 reads as, "If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause(1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final." The same provision is under Art. 192 regarding Governor's power.

The President under Article 72 has also power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) where the punishment or sentence is by a Court Martial;

(b) where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) where the sentence is a sentence of death.

The President also exercises judicial functions in appointment of judge [Art 124, 126, 127]. The President exercises the legislative function in the form of ordinance making power. Art. 123(1) says, "If at any time, except when both Houses of Parliament are in session, the President is satisfied that

circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require." When proclamation of emergency has been declared by the President due to failure of constitutional machinery, the President has been given legislative power under Article 357 of Indian Constitution to make any law in order to meet the situations. Under Art. 372(2) and Art. 372A of Constitution of India, a power has been conferred on the President to adopt any law in India by making such adaptations and modifications whether by way of repeal or amendment as may be necessary or expedient and to provide that the law so adapted or modified, shall have effect subject to adaptation and modifications so made and the adaptation and modifications shall not be questioned.

The Legislature besides exercising law-making powers exercises judicial powers also. For example, in case of removal of judges of Supreme Court an address must be passed by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity [Art. 124(4)].

Further, in President's impeachment charge is made by one House of Parliament and second House investigate regarding charge. If resolution is passed by a majority of not less than two-thirds of the total membership of the second House declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed [Art. 61(4)]. Similarly, the Legislature's function is of judicial nature in cases of breach of its privileges.

The Judiciary also exercises legislative powers. Supreme Court and High Courts are empowered to make certain rules which are legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy, it declares the same null and void. Sometimes, the High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character. Apart from this, when judges establish a new principle by means of judicial decision, they may be said to exercise legislative power and not only judicial power. The High Courts in certain spheres perform functions which are administrative rather than judicial. Their power of supervision over subordinate courts is more of administrative nature rather than judicial [Art. 127].

Under Art. 143, the President may take opinion of Supreme Court on a question which is of public importance. Analyzing to this Article, it feels that Supreme Court is advisory body of Central Government.

A deep survey of Indian Constitution shows that doctrine of separation of powers does not exist in India as there is only separation of judicial and executive functions.

Separation of Powers as Basic Structure of Constitution:

As discussed above, the Constituent Assembly did not accept the proposal for having complete separation of powers between the State's organs. But, Hon'ble Supreme Court of India in *Kesavananda Bharati v. State of Kerala*[25], declared the separation of powers as a basic structure of Constitution which cannot be destroyed through amendment of the Constitution also. This unique change in attitude of Indian Judiciary took place, perhaps to strengthen its power and status or to establish judicial supremacy. Like, in *In: Re Delhi Laws Act* (1951) XIV SCJ 527 Justice Patanjali Sastri observed that the Constitution following the British model has effected a fusion of legislative and executive powers which spells the negation of any clear cut division of governmental power into three branches which is the basic doctrine of American constitutional law

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*[26], the Supreme Court held that the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

In *Jayantilal Amritlal Shodhan* v. *F.N. Rana*[27], regarding doctrine of separation of powers, Justice Shah observed that it cannot, however, be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the state.

Thereafter, in *Minerva Mills Ltd.* v. *U.O.I.*[28], a five-judge Constitution Bench consisting Hon'ble Y.V. Chandrachud, C.J., P.N. Bhagwati, A.C. Gupta, N.L. Untwalia and P.S. Kailasam, JJ., pronounced judgment. Justice Bhagwati said that it is clear from the majority decision in *Kesavananda Bharati case* that our Constitution is a controlled Constitution which confers powers in the various authorities created and recognized by it and defines the limits of those powers.

Furthermore, in *P. Kannadasan* v. *State of T.N.*[29], a Division Bench consisting Hon'ble B.P. Jeevan Reddy and Suhas C. Sen, JJ. pronounced judgment. Justice Reddy said that our Constitution recognizes and incorporates the doctrine of separation of powers between three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between

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[25] (1973) 4 SCC 225
[26] (1955) 2 SCR 225
[27] (1964) 5 SCR 294
[28] (1980) 3 SCC 625
[29] (1996) 5 SCC 670

the legislature and executive becomes thin, the theory of separation of powers is still valid.

The Constitutional Bench, consisting Hon'ble R.M. Lodha, CJI, H.L. Dattu, Chandramauli Kr. Prasad, Madan B. Lokur & M.Y. Eqbal, JJ. in *State of Tamil Nadu v. State of Kerala* [30], held that Indian Constitution, unlike Constitution of United States of America and Australia, does not have express provision of separation of powers. However, the structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognized separation of power as a basic feature of the Constitution and an essential constituent of the rule of law. On this issue, the Court summarized as under-

> (i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs - legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.
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> (ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.
>
> (iii) Separation of powers between three organs – legislature, executive and judiciary – is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.
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> (iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.
>
> (v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an

[30] AIR 2014 SC 2407

> amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.
> (vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.
> (vii) The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are, (i) Does the legislative prescription or legislative direction interfere with the judicial functions? (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided? (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If the answer to (i) to (ii) is in the affirmative and the consideration of aspects noted in question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional.

In *NJAC Case (Supreme Court Advocates-on-Record - Association and another v. Union of India)*[31], the Supreme Court said that it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of "separation of powers" and "independence of the judiciary", which are "core" components of the "basic structure" of the Constitution, are maintained.

The doctrine of separation of powers has become concrete in the Indian context when the Court in Kesavananda Bharati's case treated the same as a basic feature of the Constitution of India. … the concept of constitutional limitation is a facet of the doctrine of separation of powers. … there can really be no strait-jacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also

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[31] Writ Petition (Civil) No. 13 of 2015 decided on 16 October 2015

formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualization and fructification of statutory rights. [32]

Supreme Court in *Dr Ashwini Kumar v. Union of India*[33], said that unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State – the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles.

Concluding Observations:

Montesquieu's theory of separation of powers was a reaction against despotic governments. He wrote in an era when governments were considered as inherently dangerous to the liberty of the individual. Hence, the government which governed the least was considered to be the ideal form of government. It was the concept of a police state; where it was proposed to give absolutely minimum functions to the government. But in the modem times, the concept of the government has totally changed and it is impossible to think that the government would only perform a negative role. The modern state is a 'welfare state', and there is a progressive expansion in the functions of the state. There is a need for economic planning for the integrated development of each and every individual. To achieve this goal, the state has to play a very positive and dynamic role. Thus, in present scenario the individual depends on the state for every type of development, progress and protective activities otherwise he cannot do anything meaningful.

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[32] *Kalpana Mehta v. Union of India*, Writ Petition (Civil) No. 558 of 2012 decided on 9 May, 2018

[33] Writ Petition (Civil) No. 738 of 2016 decided on 5 September, 2019

NEED AND RELEVANCE OF UTILITY PATENT IN INDIA

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Abstract: The utility patent is an invention that involves very minor innovative steps, which is also known as a petty patent, minor patent, or incremental patent. This patent is not yet known to Indian IP Laws. The Indian economy is changing and growing very fast, where it becomes immense necessary to take efforts to adopt the utility patent. In the lack of a favorable business environment, the issues like brain drain have been immersed as a very serious problem in India for a long time. Now it has become crucial to find out the root causes of it and work upon that. Definitely, not a single factor is responsible for this issue but still, a few of them are very closely related to it, which need to be reconsidered and dealt with in the efforts to provide the all possible favorable environment to the new young, skilled and energetic generation to create and implement their ideas in their own country. By adopting the utility model patent in Indian IP laws, we can encourage such new innovative ideas, which can bust in our domestic industries and India can become 'Aatmanirbhar Bharat'.

Keywords: Utility patent, economic development, Brain drain, Make in India, MSME, vocal for local, 'Aatmanirbhar Bharat'.

Introduction:

The core development of any country depends on its economy, which can not flourish without innovation. Innovation is the key to development in any field such as industrial, agricultural, etc. More innovation means more benefit to the inventor and the country to which it belongs too. These benefits encourage the innovators to invent new things to enjoy a monopoly over them for a definite period. The inventions require a specific kind of protection in the form of Patent law and policy to exploit their creativity to the maximum as a reward.

Innovation flows from invention and as we know the development of a country is mostly depends upon the development of its economy. In this ever-growing era, the industrial revolution is not possible without inventions. The above can be justified by taking an example of the industrial revolution (1760 - 1840), the invention of 'Spinning jenny' a spinning wool or cotton in textiles industries, 'Newcomen' steam engine, 'Watt' steam engine, 'Locomotive' in transportation industries, 'Telegraph' 'Photograph', 'The typewrite' in communication industries and 'The electric generators are among the few inventions that changed the world forever. Thus, to encourage inventions respective countries take significant steps from time to time to protect the rights of inventors to give them a monopoly to exploit their inventions to the fullest as a reward for their hard work. The Paris Convention on Patent Law Treaty is one of the significant steps collectively taken by the group of nations. However, before this convention, many countries had adopted various Patent Protection Policies at their domestic level.

We, Indians are accustomed to inventing even in our day-to-day life and call it in a humorous word 'Jugaad' or 'to manage somehow' as we hardly find the best alternative for something that we require to meet our special needs. But do

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those inventions not involve innovative steps? Are those innovations not useful? If 'Yes' then, are those inventions patentable?

Well, in concerned with India, the answer is 'No'. Usually, these inventions involve very minor innovative steps or minor improvements over existing inventions, which can not fall under patent law, but few significantly developed and developing countries recognize these minor inventions under the utility model/utility patent and invest a fair share of their GDP to encourage petty inventors which India, unfortunately, do not.

Concept of Utility Patent:

The World Intellectual Property Organization (WIPO) defines the utility patent as "A utility model is an exclusive right granted for an innovation which allows the right holder to prevent others from commercially using the protected invention without his authorization for a limited period of time". The utility patent is an exclusive right granted to the inventors for their inventions, which allows them to utilize their creativity and prevent others within a certain period to exploit without proper authorization.

The utility patent covers the creation of a new or improved and useful product process or machine and gives its inventor exclusive commercial rights to it for 20 years. [1]

The core difference between a patent and the utility patent is the quantum of innovative steps involved in the invention. The utility patent stands for a small invention, an improvement of an existing invention, and/or it can be said more appropriate for incremental invention. It is also known as 'minor patents' or 'small patents' or 'petty patents' or 'innovation patents.

Utility Patent in the World Scenario:

TRIPS is silent on the utility model. No member states are under obligation to adopt the utility model in their domestic IP laws. However, a number of significant developed as well as developing countries have implemented utility models to protect minor and incremental innovation. The few prominent nations among these are Australia, China, France, Germany, Italy, Japan, Poland, South Korea, Russia, etc.

If we take an example of Japan which was not much developed till World War II, but later realized its dire need for technical development. Although it adopted the utility model in 1995 but noticed its need for its technological development after World War II and made significant amendments to it from time to time. Now Japan is one of the most developed countries in the world.

A developing country like India which produces a significant number of scientists, unfortunately, doesn't recognize the utility patent. Indian companies have to apply for registration under the utility patent in foreign countries, which is highly discouraging to petty inventors, small enterprises, and less resourceful

[1] US Patent and Trademark Office "2701 Patent Term CR-10.2019" Accessed Nov 19, 2020

scientists.

Utility Patent as a dire need in India:

India has the largest youth population in the world, which is energetic, dynamic, and skillful. This young generation has enough capability to change the status of India from a developing to a developed country by applying their knowledge, idea, and skill and can fulfill the demand of domestic. But unfortunately, they migrate to other countries. As per the UN report 2019, India was the leading country of origin with 17.5 million international migrants.2 It is also called **Brain Drain** or **Human Capital Flight.** It causes a serious loss to the Indian economy each year. For example, a report from the Union HRD Ministry about the fee structure of IITs said that an average of 8 lacs is spent on every student for 4 years B.E. Course against the merger 2 lacs rupees paid by the student and rest of 6 lacs rupees by the Government of India. It means a single IITian who moves abroad to work for MNC, is causing a loss of 6 lacs rupees.[2]

In another study, it is observed that as many as 12% of scientists and 38% of doctors in the US are Indians. In NASA, 36% or almost 4 out of 10 scientists are Indians. 34% of employees at Microsoft, 28% at IBM, 17% at Intel, and 13% at Xerox are Indians.[3]

From the above study, it is clear that Indians are not less intellectuals as compared to other nationals. But one of the reasons for its scientific & technological backwardness and economic slowdown is Human Capital Flight, which causes grave losses each year. Now, it has become a serious concern to find out the root cause of their migration. From the observation and analyses of many studies, one thing is obvious that there is some loophole still exists in Indian IP Law, which is unable to satisfy the requirements of our young, energetic and intellectual minds.

As per the annual report of the Global Innovation Index (GII) 2020 India has been ranked 12th in terms of graduates in science & engineering and rank 35th in terms of research & development, but unfortunately, India's rank is 48th in the most innovative nation in the world and it is even first time in the history that India has entered into top 50 innovative nation list.[4] his vast gap between 12th rank to 48th rank is a serious concern for our lawmakers. This gap can be reduced by widening our IRP Laws that can encourage more innovations by implementing utility patent laws like in other developed countries where our brains are draining.

The utility model needs less time, less capital, and less effort but more gain. This petty invention plays a vital role in Micro, Small, and Medium Enterprises (MSME). This sector is the most vibrant and dynamic sector promising

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[2] International Journal of Management and Humanities (IJMH) ISSN: 2394-0913, Volume-1 Issue-11,
September 2015

[3] https://timesofindia.indiatimes.com/india/36-of-scientists-at-NASA-are-Indians-Govt-survey/articleshow/2853178.cms

[4] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf page 32-33

higher growth potential for the Indian economy. "There are close to 51 million MSME units in the country that employ about 117 million people across various sectors constituting 40% workforce. The MSMEs shares to the total GDP is about 37% and also contribute to 43% of exports based on data maintained by the ministry."[5]

Many among these industries are solely based on petty innovative things, but since Indian IP laws do not protect small patents, many MSMEs fail to protect their innovation which causes huge financial losses and discourages new entrepreneurs. In some cases, if somehow they manage to get registration for their petty patent they are bound to file in regular patent form as we know there is no separate procedure available to register this petty patent, unlike other countries which provide a cheaper procedure for petty patents. This often becomes costlier than the invention itself. In such circumstances, they feel better to move to other countries where they can protect their invention.

Changing and Growing Economy of India

Make in India-Manufacturing Industries are the soul of any economy. It shares a fair share of the GDP of a country. In China, manufacturing industries share 27%, whereas, in India, it is a mere 14%. The Manufacturing Council of India has earlier set a target of raising the share up to 25% by 2022.[6] Manufacturing brings multi-dimensional growth, like it increases employment, improves product quality and it becomes cheaper. In recent years, the Indian government has put more emphasis on increasing manufacturing industries and continuously endeavoring to attract foreign manufacturers to establish their manufacturing plants in India. The make in India program is one such endeavor aimed at transforming India into a global hub for manufacturing, research & development and an integral part of the global supply chain.

The manufacturing sector is expected to reach the US $ 1 trillion by 2025 and contribute about 25% to India's GDP. Under the 'Make in India' program, indigenous manufacturing is expected to increase by 12 - 14% per annum over the medium term. Whereas, it is expected to 100 million additional jobs by 2025.[7]

Aatmanirbhar Bharat-In the early COVID-19 crisis where the entire world economy was almost paralyzed. Cross-border trade was non-existent. It became the need of the hour for India to become self-sufficient. This need was so intense that even the pandemic could not become a wall between necessity and invention and the maxim "necessity is the mother of invention" proved true. None can forget the crisis of the alcohol-based hand sanitizer. That crisis brought a new idea. The women of the tribal community of Madhya Pradesh's Alrajpur district started

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5 https://economictimes.indiatimes.com/small-biz/sme-sector/sidbi-and-transunion-cibil-launch-msme-pulse/articleshow/63269240.cms

6 https://www.financialexpress.com/economy/how-manufacturing-sector-drives-economic-growth/2122128/lite/?utm_source=Whatsapp&utm_medium=social&utm_campaign=Whatsapp

7 https://www.ibef.org/industry/manufacturing-sector-india.aspx

making hand sanitizer from liquor made from Mahua flowers.

Let's not forget one more tremendous transformation in the clothing industry. In early 2020 COVID-19 crisis hit the clothing industry very badly. Many factories shut down and thousands of workers became jobless overnight. This catastrophe gave birth to the idea to transform the clothing industry into PPE kit production factories. This sudden transformation witnessed India from zero PPE kit production to producing 2.06 lacks kits daily within 2 months.[8]

Boycott China/Vocal for Local-For a long time we Indians were hearing 'Boycott Chinese Products' but this slogan suddenly triggered in mid-2020 with border conflict with China. The hater retaliation from both sides caused many Indian soldiers to get martyred at the Galwan Valley, which shook the entire nation. It won't be wrong to say we Indians are very sentimental, and it is clearly observed in the Indian market. Even the general buyer showed their retaliation by boycotting 'Made in China' products. In between, the Indian Prime Minister's call 'Vocal for Local' proved a masterstroke and strike on the right chord and boycott Chinese products lobby got more momentum. This call was no less sentimental than the Boycott 'Made in China' movement as the saddest crisis of COVID-19 was the loss of livelihood and even countless lives of poor people. Thus, on the 'Vocal for Local' call general public join their hands together to help the poor laborers and local vendors and refused Chinese goods.

On the occasion of Diwali festive sales in 2020, the total turnover was generated Rs.72, 000 crores whereas, CAIT claimed that China lost Rs. 40,000 crore. "Traders across the country under the flag of CAIT adopted Vocal for Local and Aatmanirbhar Bharat call of Prime Minister Shri Narendra Modi by selling Indian goods. The robust sales that happened in commercial markets during the Diwali festive season indicate good business prospects in the future and brought back some smiles on the faces of traders. Diwali festive sales also indicate that the people of India have beaten both COVID-19 and China in terms of sale-purchase of festive goods." -CAIT. On social media, many Chinese apps were underrated and deleted overnight, while counter-Indian apps were installed.

From the above study, it is evident that the majority of Indians are willing to discard Chinese products. However, the question is whether the Indian market is ready to do so? The answer is definitely no. If we compare these two countries we found some loopholes.

In the global ranking, in research output China's rank is 1st and India ranked 5th. China invests $ 278 billion (2.1% of GDP) in research, on contrary India invests only $ 15.4 billion (0.7% of GDP). The total number of patents filed in the year 2016 - 2017 by China was 1.38 Million, whereas India filed only 45,444 in total.

So, from the above comparison, it is clear that India lags China far behind in investment, research, and patent. It is important to remember that China is among the nations that have adopted the utility model in their domestic IP law. So

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8 https://timesofindia.indiatimes.com/india/from-zero-india-now-produces-around-2-lakh-ppe-kits-per-day/articleshow/75556879.cms

India should also follow the example of China and fill its IP loopholes by amending its IP laws and providing some basic protection to minor yet useful ideas.

Concluding Observations:

A utility patent has proved its dynamic role in many developed and developing countries. It can also play a vital role in the economic development of India. Our country is known as one of the youngest countries in the world with an average age of 29. This huge, energetic young population need opportunity to utilize their skill in the right direction in their own country. Looking at it as an opportunity, it's the best time for the Government of India to take the benefits of the nationalist sentiment of Indians for a good cause and make the country favorable and flexible with new innovative ideas. This Utility Patent can prove as a milestone for India toward becoming an 'Aatmanirbhar Bharat' and succeeding in 'Boycott Made in China' and can help in raising our 'Vocal for Local' drive more powerfully.

Now Indians are looking for alternatives to Chinese goods and are ready to accept domestic products even at a little higher price. The domestic manufacturers, entrepreneurs, and even foreign investors are considering it as a good opportunity to invest in manufacturing in India to fulfill the aspiration of 'Make in India'. In pursuance of it, the Government should adopt the utility model patent to make the Indian IP laws more flexible and favorable. It can prove fruitful by;

1. Encouraging the local inventors to invest in new innovation by providing protection to their petty inventions.
2. Protecting the MSMEs, those who are solely dependent on petty/ small inventions but not able to register their inventions.
3. Providing opportunities for those skilled laborers who migrated to other countries each year.
4. Attracting foreign manufacturers.

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